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No. 09-

IN THE

Supreme Court of the United States

JANNERAL DENSON and JORDAN L. TAYLOR, a minor, through his Legal Guardian JANNERAL DENSON,
Petitioners,

v.

UNITED STATES OF AMERICA, LEE LAVENKA, and CHERYL FRIEDLAND,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether, notwithstanding state law to the contrary, the injuries and claims of a child who was injured as a fetus, but born alive, are necessarily derivative of his mother's injuries and claims under the Federal Tort Claims Act.

II. Whether, under the Federal Tort Claims Act, the standards for liability for intentional torts committed by federal law enforcement officers are determined solely by federal law.

III. Whether a subsequent appellate panel can conclude that government officials are entitled to qualified immunity, as a matter of law, when a prior appellate panel had concluded that they were not entitled to qualified immunity, as a matter of law.

PARTIES TO THE PROCEEDINGS BELOW

The Petitioners in this Court, Janneral Denson and Jordan L. Taylor, a minor, were the plaintiffs in the District Court. Petitioners were also appellants in the Court of Appeals. The appellees in the court of appeals were the United States of America, Lee Lavenka, Cheryl Friedland, Ileana Hollant, Marie Prospere, Doreen Simmons, and John Bennett, M.D. Petitioners, however, do not challenge the District Court's and Eleventh Circuit's rulings in favor of Ileana Hollant, Marie Prospere, Doreen Simmons, and John Bennett, M.D. Therefore, the Respondents herein are the United States of America, Lee Lavenka, and Cheryl Friedland.

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Petitioners, Janneral Denson and Jordan L. Taylor, a minor, respectfully petition the Court for a writ of certiorari to review the final judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Tjoflat, Carnes, and Hill), awarding Respondents qualified immunity, is reported at 574 F.3d 1318 (11th Cir. 2009) and is included as Appendix A. The Findings of Fact and Conclusion of Law of the United States District Court for the Southern District of Florida (Moore, J.), is unreported and included as Appendix B. The interlocutory opinion of the United States Court of Appeals for the Eleventh Circuit (Tjoflat, Birch, and Black), is unreported and included as Appendix C. The Order of the United States Court of Appeals for the Eleventh Circuit dismissing appeal no. 04-16392-DD for lack of jurisdiction is included as Appendix D.

STATEMENT OF JURISDICTION

The final judgment of the United States Court of Appeals for the Eleventh Circuit was entered on July 15, 2009. Petitioners' timely Petition for Rehearing En Banc was denied on October 6, 2009 and is included as Appendix E. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

On February 14, 1997, Petitioner Janneral Denson, a young African-American, obviously pregnant woman was returning from a short trip to Jamaica where she had been visiting with her Jamaican husband.

Upon leaving the luggage area, Petitioner was stopped by Respondent Friedland, a customs officer. Petitioner was subjected to questioning, search of her luggage and body. No contraband was found.

Despite the negative results, Petitioner, without her consent, was shackled and taken to Jackson Memorial Hospital for further examination. This action was approved by Respondent Lavenka, based solely on the alleged suspicions told to him by Friedland.

A subsequent pelvic and ultrasound examination was ordered by Friedland and performed, without Petitioner's consent, by a medical doctor for Jackson Memorial Hospital. The doctor informed Respondent Friedland that the examination disclosed that Petitioner had no contraband in her body, had no room for anything other than the baby, Jordan Taylor, and that the pregnancy was high risk.

Despite the negative results and the obvious threat to the baby, Jordan Taylor, Respondent Lavenka authorized Respondent Friedland to forcibly take the Petitioner to Ward D of Jackson Memorial Hospital. There, shackled to a bed, Petitioner was informed by Respondent Friedland that she was required to ingest Go-Lytely, a severe bowel cleanser, and produce three

clear monitored stools before she would be released from custody.

Petitioner remained shackled to a bed for forty-two hours. She was allowed to get out of the bed only to clean her bedpan. During her confinement, Petitioner complained of abdominal cramping, pain and vaginal bleeding. This was ignored by all.

After Petitioner produced three clear stools, Respondents had her taken back to Fort Lauderdale Airport and released. At the time, Petitioner was in pain and bleeding.

Within days, Petitioner began to hemorrhage, requiring her to undergo an emergency cesarian to save both her life and that of her child. The child, Jordan Taylor, weighed 3 lbs., 4 oz. at birth, and remained in the intensive care unit for one month.

To justify their actions, Respondents relied heavily upon a piece of paper in Ms. Denson's possession which clearly concerned immigration questions relating to her husband's immigration status, as well as, making generalized drug courier profile allegations. The Eleventh Circuit Panel 1 found this to be insufficient as a matter of law. In affirming, the district court's denial of summary judgment based upon qualified immunity, the Eleventh Circuit Panel 1 stated:

> "[R]easonable suspicion to justify a strip search can *only* be met by a showing of articulable facts which are particularized as to the place to be searched. . . ." *Id.* (quoting

> *United States v. Vega-Barvo*, 729 F.2d 1341, 1349 (11th Cir. 1984). As a search progresses, a customs agent must reevaluate at each stage whether reasonable suspicion exists to justify the next level of intrusion, in light of facts theretofore accumulated. *Id.* Highly intrusive searches like body cavity examinations require an even greater degree of suspicion. *United States v. Pino*, 729 F.2d 1357, 1359 (11th Cir. 1984). . . . Furthermore, the law in this circuit is clearly established that customs inspectors cannot conduct strip searches merely because an entrant fits a "*generalized courier profile.*" *Brent*, 247 F.3d at 1304 (citing *Reid v. Georgia*, 448 U.S. 438, 441, 100 S. Ct. 2752 (1980) (per curiam))." (Emphasis added). *See* Appendix C, at 121a, 122a.

Subsequent to the Eleventh Circuit Panel 1 opinion, Petitioners went to trial on their FTCA claims and Bivens action. At the close of the liability evidence as to Petitioner's Bivens claim, the district court, having bifurcated the liability and damages aspects of the trial, required Petitioners to rest as to their FTCA claims.

The district court found against Petitioners on their FTCA claims and dismissed the jury as to Petitioners' Bivens claim, finding that the dismissal of the FTCA claims barred the Bivens action. The district court also granted qualified immunity to Respondents Lavenka and Friedland.

The district court abandoned the dictates of the first Panel opinion, holding, instead, that the search of

Petitioner's body should be viewed from the perspective of the search of a vehicle. This search of Petitioner's body was equated to searching the car in the movie the "French Connection," where the drugs were only found after dismantling the rocker panels of the car doors. This standard was adopted by the Eleventh Circuit Panel 2, wherein, it held that it was no longer necessary for law enforcement to evaluate the evidence at each more intrusive and dangerous search of a human being's body since "an absence of proof is not proof of absence." *See* Appendix A, at 50a.

REASONS FOR GRANTING THE PETITION

I. Whether, notwithstanding state law to the contrary, the injuries and claims of a child who was injured as a fetus, but born alive, are necessarily derivative of his mother's injuries and claims under the Federal Tort Claims Act?

"In the Tort Claims Act Congress has expressly stated that the Government's liability is to be determined by the application of a particular law, the law of the place where the act or omission occurred . . ." *Richards et al v. United States*, 369 U.S. 1, 9 (1962). Contrary to 28 U.S.C. §1346(b)(1) and long established decisions of this Court and, contrary to Florida law, the Appellate panel stated "since Jordan Taylor's tort claims are derivative of his mother's claims, we will focus on the allegedly tortious treatment of Denson." *See* Appendix A, at 14a, n.18.

Under Florida law, a child who suffers prenatal injuries and is born alive has an independent cause of

action against the alleged tort-feasor, which relates back to the time of the injury. The child, Petitioner Jordan Taylor, brought an independent cause of action under the FTCA for his own prenatal injuries caused by Respondents Friedland and Lavenka's wrongful actions constituting the torts of assault, infliction of emotional distress and invasion of privacy under Florida law. Under Florida law, Jordan Taylor's injuries are not derivative injuries, and his claims under the FTCA for assault, invasion of privacy and infliction of emotional distress that caused him physical harm are separate, direct and independent claims.[1]

The Eleventh Circuit's decision that Taylor's claims were derivative of his mother's claims conflicts with its earlier decision in *Del Rio, supra*, and is in conflict with other circuits which have determined that local law governs whether a claim is derivative. *See Schwarder v. United States*, 974 F.2d 1118 (9th Cir. 1992)(Under applicable California law, the children's wrongful death claim is not a derivative claim, but a separate and independent claim); *Montellier v. United States*, 315 F.2d 180 (2nd Cir. 1963)(same under Massachusetts law); *Fisk v. United States*, 657 F.2d 167 (7th Cir. 1981)(wrongful death claim is independent and not derivative under Indiana law).

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1. See: *Del Rio v. United States*, 833 F.2d 282, 286-7 (11th Cir. 1987); *R.J. v. Humana of Fla., Inc.*, 652 So.2d 360, 363 (Fla. 1995); *Champion v. Gray*, 478 So.2d 17, 22 (Fla. 1985); *Metropolitan Life Ins. Co. v. McCarson*, 467 So.2d 277, 278 (Fla. 1985); *Agency for Health Care Administration v. Associated Industries of Florida, Inc.*, 678 So.2d 1239, 1252 (Fla. 1996).

Respondents knew that Denson was pregnant, that she had been bleeding, and, after the pelvic exam and ultrasound, knew that her pregnancy was at risk. The evidence and testimony at trial was unrefuted that the label on the bottle of Go-Lytely stated that it had not been tested on pregnant women, that Ms. Denson initially refused to drink it, that she had expressed her fears to Friedland that taking a laxative would cause premature labor, and that Friedland had taken the label from Denson, telling her to drink the Go-Lytely or she would not be allowed to leave. Neither the lower court nor Appellate Panel 2 cited any facts justifying Respondents' conduct in requiring Denson to take the Go-Lytely, despite the obvious risk of harm to the minor child, Jordan Taylor.

By ignoring Petitioner Taylor's claims altogether, no factual determination was ever made as to whether the force directed towards the unborn child, subjecting him to an unnecessary and obvious risk of harm, was reasonable and justified under the circumstances. "In the absence of consent, the agents can detain you until nature reveals the truth or falsity of their suspicions." *United States v. Pino*, 729 F.2d 1357, 1360 (11th Cir. 1984). However, Respondents did not wait for nature to take its course. Friedland required Denson to take a powerful laxative, telling her that she would not otherwise be allowed to leave. Janneral Denson's unborn child, Petitioner Jordan Taylor, was permanently injured as a direct result.

Petitioner Taylor, born alive and therefore a person under Florida law, suffered separate, distinct and permanent prenatal physical injuries which relate back

to the time of the injury caused by Respondents' treatment of his mother and, under Florida law, his FTCA claims were a separate and independent cause of action.

II. Whether, under the Federal Tort Claims Act, the standards for liability for intentional torts committed by federal law enforcement officers are determined solely by federal law.

Relying on *In re Neagle*, 135 U.S. 1 (1890), the Appellate Court held that only federal law should be applied in determining any liability of the United States for intentional torts pursuant to the law enforcement proviso of the Federal Tort Claims Act, regardless of whether liability could be found under state law. *See* Appendix A, at 59a-60a.

Because the common law torts enumerated in §2680(h) are analogous to constitutional violations, the Eleventh Circuit developed a reverse judgment bar. *See* Appendix A, at 35a-36a. The Appellate Court reasoned that if a plaintiff failed to establish a constitutional violation in a concurrent Bivens claim, then, "based on the Bivens evidence," the FTCA claim could be barred by the discretionary function exception or the Supremacy Clause but, if the Bivens claim is successful, these defenses would not be available, since government officials lack discretion to violate constitutional rights. *Id.*

The Appellate Court opinion, in the instant case, has created a judicial exception to the FTCA's "law of the place" rule, deciding that, "for purposes of the FTCA

case before us, assessing whether the United States is amenable to liability under state law for the allegedly tortious conduct of Friedland and Lavenka requires reference to federal law." *See* Appendix A, at 60a. This is contrary to the holdings of this Court, prior Eleventh Circuit decisions and other circuits.[2]

There also exists a conflict between and within the circuits as to whether the government's liability, pursuant to the 1974 amendment to §2680(h), is to be analyzed under federal or state law, with the Eleventh Circuit taking up its position with the minority of circuits applying federal law. *Norton v. United States*, 581 F.2d 390, 393 (4th Cir. 1978), cert. denied 439 U.S. 1003 (1978) held that "the liability of the United States under §2680(h) is coterminous with the liability of its agents under *Bivens*," and, incorporating Fourth Amendment standards "to allow vicarious liability only in those cases where individual liability would lie under Bivens." *Id.* at 395. *Caban v. United States*, 728 F.2d 68, 74 (2nd Cir. 1984), held that the United States was not liable under the FTCA "if the INS agents acted in conformance with the federal standards regarding treatment of applicants for entry to the United States." These cases are in conflict with *Arnsberg v. United States*, 757 F.2d 971, 977-78 (9th Cir. 1985), which held that liability for intentional torts by federal law enforcement officers was determined by state law. *Brown v. United States*, 653 F.2d 196, 201 (5th Cir. 1981), rejected vicarious liability for constitutional violations stating,

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2. *F.D.I.C. v. Meyer*, 510 U.S. 471, 478 (1994); *Ochran v. United States*, 273 F.3d 1315, 1317 (11th Cir. 2001); *Dalrymple v. United States*, 460 F.3d 1318, 1327 (11th Cir. 2006)

"[t]he explicit language of the proviso does not permit a litigant to escape the 'law of the place' limitation. . . . the phrase as used in Section 1346(b) refers exclusively to state law. Carlson v. Green, 446 U.S. 14, 23 (1980)." *Hernandez v. Lattimore*, 612 F.2d 61, 67 (2nd Cir. 1979) held that "[t]he FTCA provision, providing a vehicle for the redress of certain common law torts, has a broader remedial scope than that accompanying a Bivens action. This is so because Bivens requires that there have been a constitutional violation giving rise to federal question jurisdiction under 28 U.S.C. §1331; and we recognize, as have other courts, that some common law torts and some statutory torts, although actionable in state forums, do not rise to the level of constitutional violations." *Birnbaum v. United States*, 588 F.2d 319, 328 (2nd Cir. 1978), held "[s]ince Congress restricted the basis for liability under the Act to the 'law of the place,' we think that it would be a tour de force to consider direct violations of the federal constitution as 'local law' torts." *Johnson v. Sawyer*, 47 F.3d 716, 727 (5th Cir. 1995), held that, "[w]hile as a matter of abstract linguistics the phrase 'law of the place where the act or omission occurred' might be thought to include generally applicable federal law, it has long been settled that it does not, and that 'the liability of the United States under the Act [FTCA] arises only when the law of the state would impose it.'" *Friedman v. United States*, 927 F.2d 259, 261-2 (6th Cir. 1991), applied state law to determine FTCA claims for false arrest, false imprisonment, and malicious prosecution.

In the absence of a clear statutory prescription, federal law may preempt state law only where there is a uniquely federal interest and there is a significant

conflict between federal policy and the operation of state law. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504-05, 507 (1988). Not only is there no conflict with state law,[3] but Congress has specifically prescribed that state law determines liability in FTCA claims.

Moreover, preventing the smuggling of contraband drugs across the country's borders into the State of Florida is not a uniquely federal interest. Florida Statute §893.135 criminalizes the trafficking in every conceivable kind of illegal or prescription drug and Florida courts have enforced this law with respect to Florida's international borders.[4]

III. Whether a subsequent appellate panel can conclude that government officials are entitled to qualified immunity, as a matter of law, when a prior appellate panel had concluded that they were not entitled to qualified immunity, as a matter of law.

In the instant case, the Appellate Court Panel 1 had held that: ". . . a reasonable customs inspector acting in the federal defendants' stead would have known that

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3. *Perez v. State*, 620 So.2d 1256, 1258 (Fla. 1993); *Bernie v. State*, 524 So.2d 988 (Fla. 1988).

4. *See: Marrero v. State*, 428 So.2d 304 (Fla. 2nd DCA 1983) (state prosecution for trafficking in illegal drugs pursuant to §893.135 from Jamaica to Florida); *Laurore v. State*, No. 3D06-2015 (Fla. 3rd DCA 2009)(state enforcement of U.S. Customs arrest for smuggling illegal drugs from Jamaica to Miami International Airport); *Hoyte v. State*, 518 So.2d 975, 976 (Fla. 2nd DCA 1988)(police arrest for smuggling illegal drugs from Jamaica to Tampa International Airport).

the nonparticularized, general concerns evoked by Appellee's appearance and actions did not create sufficient probable cause to justify the intrusive searches," affirming the lower court's ruling that Friedland and Lavenka had violated Denson's clearly established constitutional rights. Without a jury verdict, this was the law of the case. *Agostino v. Felton*, 521 U.S. 203, 236 (1997); *Tonkovich v. Kansas Board of Regents*, 254 F.3d 941 (10th Cir. 2001); *Veneklase v. City of Fargo*, 248 F.3d 738, 748 (8th Cir. 2001). "If, as here, the facts as they emerged during the trial...are essentially the same as those alleged by the plaintiff in her first appeal, *law of the case requires that the subsequent appellate panel adhere to the legal conclusion that the first panel reached* — that is, the defendants are not entitled to qualified immunity." (Emphasis added). *Riley v. Camp*, 130 F.3d 958, 988 (11th Cir. 1997)(Birch, concurring); *Kimberlin v. Quinlan*, 199 F.3d 496, 500-02 (D.C. Cir. 2000); *McCloud v. Testa*, 97 F.3d 1536, 1562 (6th Cir. 1996). When the evidence contained in the summary judgment record that was previously relied on to determine a Fourth Amendment seizure was also presented at trial, the court is "bound under the law of the case doctrine to our prior seizure determination." *In re City of Philadelphia Litigation*, 158 F.3d 711, 714 (3rd Cir. 1998).

Having decided Denson's FTCA claim against her, the lower court applied the judgment bar to preclude a jury decision on Petitioner's Bivens claim. Thereafter, the lower court adopted its FTCA facts to grant Respondents qualified immunity. Panel 2 of the Appellate Court of the Eleventh Circuit, in adopting these "facts," usurped the role of the jury on the Bivens claim. *Johnson v. Breeden*, 280 F.3d 1308 (11th Cir. 2002).

Factual FTCA findings cannot be used to preclude fact-finding by the jury with a Bivens claim. *Burns v. Lawther*, 53 F.3d 1237, 1242 (11th Cir. 1995).

Without a jury verdict through special interrogatories, there could be no factual determination upon which to base a qualified immunity analysis to decide whether the continued detention and ever more intrusive body searches of Petitioner's body had violated her constitutional rights.

The jury was not required to believe the testimony of the Respondents. Considering Friedland's many self-contradictory statements and testimony contradicted by documentary evidence and the testimony of other customs officials, the jury was at liberty to conclude that her version of events was a tissue of lies. It was the jury's job to weigh the evidence. The jury could have reasonably concluded that, instead of being a suspicious "hand-written 'cover story,'" as Appellate Panel 2 inferred (in direct contradiction to Panel 1), the script was solely for immigration purposes. The jury could have afforded little or no weight to the expired TECS lookout and found that Denson's carry-on bag and clothing were appropriate for her short trip, that the source of her two $100 bills was confirmed by her tax receipt, and that her affidavit of citizenship was a commonly used means of identification for traveling to the Caribbean. The evidence also showed that Denson's ticket was purchased by an easily traceable check, that she is a U.S. citizen with a verifiable home address, and had appropriate cash to return home.

The evidence and inferences, viewed in the light most favorable to Denson, the non-moving party, are not at all suspicious, nor was the fact that she had taken a few prior trips to Jamaica, since she was married to a Jamaican. With the credibility determinations, weighing of evidence, and drawing of inferences unfavorable to the non-moving party impermissibly made by both the lower court and Appellate Panel 2 removed, all that is left is that Janneral Denson "had arrived from Jamaica, a 'source country,'" like everyone else on the airplane, "had only stayed in Jamaica for one and a half days," and she "was pregnant."

Reasonable suspicion requires a particularized and objective basis for suspecting a particular person of smuggling. Moreover, in *United States v. Vega-Barvo*, 729 F.2d 1341 (11th Cir. 1984), cert. denied 469 U.S. 1088 (1984), the Eleventh Circuit adopted a flexible test to determine the reasonableness of a search based on its intrusiveness stating that "[i]t must be conceded without need for analysis that *as medical danger increases because of a search procedure, so must the reasons for conducting the procedure.*" (Emphasis added). *Id.* at 1348. See also: *Brent v. Ashley*, 247 F.3d 1294, 1300 (11th Cir. 2001); *United States v. Montoya de Hernandez*, 473 U.S. 531, 541-42 (1985). Such intrusive body searches have been found to be constitutional only when consent was given. *Vega-Barvo*, *supra*, at 1349; *Pino*, *supra*, at 1360; *United States v. Saldarriaga-Marin*, 734 F.2d 1425, 1428 (11th Cir. 1984). Where consent was refused, the suspects were detained until nature took its course.[5]

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5. *United States v. Mosquera-Ramirez*, 729 F.2d 1352, 1355 (11th Cir. 1984); *United States v. De Montoya*, 729 F.2d 1369, 1370 (11th Cir. 1984); *United States v. Henao-Castano*, 729 F.2d 1364, 1366 (11th Cir. 1984); *Montoya de Hernandez*, *supra*, at 546.

In reaching its decision, Appellate Panel 2 found that, although the pelvic and ultrasound drug searches were negative, "they did not rule out the possibility that Denson was smuggling drugs in her alimentary canal." *See* Appendix A, at 12a-13a. Therefore, Appellate Panel 2 reasoned that the intrusive, dangerous and degrading search of a human being should be evaluated from the standpoint of a *Terry* stop and search of an automobile, citing to *United States v. Arvizu*, 534 U.S. 266 (2002), applying the "totality of circumstances" standard for establishing reasonable suspicion. *See* Appendix A, at 46a.

This Court has noted that "[t]he reasons that might support a requirement of some level of suspicion in the case of highly intrusive searches of the person — dignity and privacy interests of the person being searched — simply do not carry over to vehicles." *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004). By rejecting its own former standard requiring an increasing level of suspicion to justify the increasing intrusiveness of searches, the Eleventh Circuit is in conflict with other circuits, which do employ such balancing tests for searches of persons' bodies. See: *United States v. Dorsey*, 641 F.2d 1213, 1218-19 (7th Cir. 1981)(level of suspicion must be balanced against level of intrusiveness and indignity); *United States v. Wardlaw*, 576 F.2d 932, 934 (1st Cir. 1978)("The quantum of facts necessary to justify a search is related to the degree of the intrusion: 'what constitutes "reasonable suspicion" to justify a particular search may not suffice to justify a more intrusive or demeaning search.'"); *United States v. Asbury*, 586 F.2d 973, 976 (2nd Cir. 1978) ("[r]easonableness is determined by weighing the warranted suspicion of the border

official against the offensiveness of the intrusion"); *United States v. Vance*, 62 F.3d 1152, 1156 (9th Cir. 1995)("As the search becomes more intrusive, more suspicion is needed."); *Levoy v. Mills*, 788 F.2d 1437, 1439 (10th Cir. 1986)("It is an established Fourth Amendment principle that 'the greater the intrusion, the greater must be the reason for conducting a search.'").

It is a matter of record that Denson refused to cooperate, refused to drink the bowel cleanser and ultimately did so only under extreme duress after Friedland told her "that she had to drink the Go-Lytely and pass three clear stools or she was not going to be able to leave." See Appendix B, at 93a. This was not a valid consent to search her body and place herself and her unborn child at risk. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

Despite no consent, Appellate Panel 2 held that "[o]nce acquiring reasonable suspicion, Friedland, with Lavenka's approval, could legally detain Denson for 'the period of time necessary to either verify or dispel the suspicion,' including transporting Denson to the hospital for a pelvic exam and, if necessary, monitored bowel movements." *See* Appendix A, at 51a.

Whether an officer has a reasonable suspicion is an objective question viewed from the standpoint of a reasonable officer at the scene. *Ornelas v. United States*, 517 U.S. 690, 696 (1996). Based upon the identical evidence presented at the summary judgment stage, Appellate Panel 1 had found that Respondents' actions were not objectively reasonable and that they had

violated Petitioner's constitutional rights. Therefore, whether arguable reasonable suspicion existed for a search is dependent upon whose version of events a jury believes. *Jackson v. Sauls*, 206 F.3d 1156 (11th Cir. 2000).

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JULY 15, 2009

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 05-15572

D.C. Docket No. 98-07256-CV-KMM

United States Court of Appeals,

JANNERAL DENSON, JORDAN L. TAYLOR, a minor, Janneral Denson, Guardian,

Plaintiffs-Appellants,

versus

UNITED STATES of America, JOHN & JANE DOES, certain unnamed United States Customs Agents, individually and in their official capacities as United States Customs Agents, PUBLIC HEALTH TRUST OF MIAMI-DADE COUNTY, d.b.a. Jackson Memorial Hospital, IRA CLARK, individually and as President/Director of Jackson Memorial Hospital, JOHN & JANE DOES, DRS., certain unnamed Doctors and Nurses employed by Jackson Memorial Hospital, individually and in their official capacities as Doctors and Nurses employed by Jackson Memorial Hospital, et al.,

Defendants-Appellees.

Appendix A

Appeal from the United States District Court
for the Southern District of Florida.

Before TJOFLAT, CARNES and HILL, Circuit Judges.

TJOFLAT, Circuit Judge:

This case arose when Janneral Denson and Jordan L. Taylor sued the U.S. Customs Service, Customs Inspectors Cheryl Friedland and Lee Lavenka, and several members of the Jackson Memorial Hospital medical staff under *Bivens v. Six Unknown Named Agents,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), and the Federal Tort Claims Act.[1] Denson claimed that the Customs inspectors violated her rights under the U.S. Constitution and Florida tort law by searching her at the Fort Lauderdale International Airport after she arrived aboard a flight from Jamaica on the purported suspicion that she was attempting to smuggle narcotics into the United States inside her alimentary canal.[2] She also claimed that the inspectors and the

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1. *See* Federal Tort Claims Act (FTCA), Pub.L. No. 79-601, §§ 401-424, 60 Stat. 812, 842 (1946) (codified as amended in scattered sections of 28 U.S.C.). *Bivens* and FTCA claims are brought against separate defendants. *Bivens* claims are brought against federal employees in their individual capacities; FTCA claims are brought against the United States. In this matter, the plaintiffs combined the claims in a single complaint. For ease of discussion, we refer to the *Bivens* and FTCA claims as separate cases.

2. The alimentary canal is also known as the gastrointestinal tract or the digestive tract. After an external

(Cont'd)

hospital's medical staff violated the same rights by utilizing certain invasive procedures at the hospital in an effort to determine whether she was carrying drugs internally. The United States District Court for the Southern District of Florida entered judgment in favor of the defendants in both actions and Denson and Taylor appeal. We affirm.

I.

A.

South Florida is a notorious entry point for narcotics smugglers from source countries, such as Jamaica. To maximize its ability to detect these smugglers, the U.S. Customs Service employs a dyadic checkpoint configuration at South Florida airports. This system requires each deplaning passenger to first pass through a primary checkpoint, located just past the baggage carousel, where inspectors perform inspections of passenger documents and ask routine questions concerning the purpose of the passenger's trip. If nothing appears out of the ordinary, the inspector clears the passenger for entry into the United States. On the opposite end of the room, between the primary checkpoint and the main terminal, Customs inspectors

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(Cont'd)
examination of Denson's body failed to reveal any contraband, the hospital staff gave Denson a laxative to discover whether she was carrying drugs internally. They discovered that she was not.

operate a secondary Customs station to scan the entire concourse and note any unusual or suspicious activities or behaviors that might warrant further investigation. For instance, Customs trains its inspectors to mind when a passenger is traveling without checked baggage because internal narcotics couriers commonly travel without luggage to minimize the amount of time they have to remain in Customs.

At 6:00 p.m. on Wednesday, February 12, 1997, Janneral Denson, a six-months' pregnant American citizen residing in Boynton Beach, Florida, traveled on Air Jamaica flight 36 from Miami, Florida to Kingston, Jamaica. The nonstop flight lasted one hour and forty minutes and landed at 7:40 p.m. Less than two days later, on the afternoon of February 14, 1997, Denson returned to the United States via Air Jamaica flight 89, arriving at the Fort Lauderdale International Airport around 3:30 p.m. Denson had originally been scheduled to arrive at the Miami International Airport at 1:25 p.m., but Air Jamaica canceled her original flight and rerouted her to Fort Lauderdale, where it planned to provide her ground transportation to her car in Miami.

Because of its point of departure, Customs inspectors in Fort Lauderdale were on high alert when Air Jamaica flight 89 arrived. Consistent with Customs procedures and directives, after deplaning and clearing immigration, Denson provided her declaration form to a Customs inspector stationed at the airport's primary checkpoint and answered several standard questions about her trip. Satisfied with Denson's responses, the

inspector cleared her for entry into the United States. From the vantage point of the secondary inspection area, Senior Customs Inspector Cheryl Friedland noticed Denson, a single traveler carrying no checked luggage, quickly exiting the Customs area and avoiding her eye contact. Her suspicions peaked, Friedland hurriedly walked toward Denson and called out to her. Though Denson stood no more than five feet away from Friedland, she did not respond and appeared to ignore Friedland's efforts to stop her. After catching up with Denson, Friedland escorted her to the secondary Customs station for questioning.[3]

Once at the examination area, the obviously pregnant Denson had trouble answering Friedland's routine questions and exhibited signs of nervousness-Denson held tightly to the x-ray machine to avoid shaking,[4] avoided eye contact, was breathing heavily, and sweating profusely. Based on her training and experience, Friedland identified Denson's behaviors and general demeanor as indications that Denson was attempting to hide contraband. Friedland also took into account the infamous fact that drug dealers frequently recruit pregnant women as internal drug couriers ("mules") because x-ray examinations may not be performed on a pregnant woman for fear of harming the unborn child.

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3. The secondary station area consisted of a computer terminal and an x-ray machine for examining luggage and other items.

4. Denson was holding onto the belt that fed items into the machine.

Appendix A

Friedland began interviewing Denson by asking her about the purpose of her trip to Jamaica. Denson responded that she had flown to Jamaica to visit her husband, Richard Scott, but she was initially unable to recall where he lived. After pausing for a few moments, Denson simply stated that her husband lived in a parish in Jamaica. Friedland next asked Denson how she contacted her husband. Denson replied that she contacted him by telephone, but she could not remember his phone number. Friedland next examined Denson's tickets and took note that they had been purchased only four days prior to Denson's departure and that the duration of her trip to Jamaica was extremely brief, approximately one and a half days. Friedland considered this factor significant because internal narcotics smugglers often take short trips to limit expenses and increase the overall profitability of their trip.

Friedland then asked Denson how she acquired her plane ticket and who paid for it; she replied that she did not know. When asked again, Denson, after some hesitation, stated that a man named Osmond purchased her ticket, but she did not know his last name. When asked about her employment, Denson said that she worked for Office Depot. She then gave Friedland a telephone number that she claimed was her work number. Friedland called only to discover that the number had been disconnected. These responses significantly heightened Friedland's suspicions that Denson was attempting to smuggle drugs into the United States. Among other things, third-party booking, like that provided for Denson, is a familiar method

smugglers employ to avoid revealing their identity; additionally, Customs trains its inspectors to take note when persons provide unverifiable employment information, as narcotics smugglers are often unable to provide such specific information.

Friedland proceeded to search through Denson's belongings-a manila folder, a purse, and a small carry-on bag. Of note, Denson had in her possession two new $100 bills and six $1 bills,[5] a marriage register of the marriage between herself and Scott, an affidavit of citizenship in lieu of a passport,[6] and a tablet of paper containing the following hand-written information about her husband that appeared to be a cover story written for Denson by a third party:[7]

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5. Customs inspectors know that drug smugglers often travel with one-hundred dollar bills.

6. At this time, United States citizens were permitted to travel to Jamaica with an affidavit of citizenship. Denson obtained her affidavit from a notary employed by Skycaps International at the Miami International Airport. Friedland had not previously encountered this type of travel document.

7. Denson testified at trial that she was also carrying immigration application documents for Scott and pictures of her wedding and that she informed Friedland that the purpose of her visit was to meet with Jamaican immigration officials. Friedland disputed these assertions. We additionally note that the immigration documents plaintiff introduced at trial were issued by the United States government and were to be filed with the U.S. Immigration and Naturalization Service, not Jamaican authorities.

Appendix A

Richard Scott-Poultry Farmer Since 1994

Lives @ Belfast Near Morant Bay in the Parish of Saint Thomas

His birthday is: Feb. 17th (Born 1972)

How you met.

Dec. 1995 A friend invited you to Jamaica while there went to the beach Dunns River met him there

Dec. 1996 He visited you at your friends Saint Anne home you invited him at his Saint Thomas home

*You had no prior knowledge of him

You returned home to Florida-Telephone Exchange

*Always used calling cards-Price Reasons

March 1996 You went down to visit him in Jamaica.

Oct. 1996 You went back to marry him

*His phone number written down at home 809 something

Appendix A

You are not good with remembering numbers.

*NOT HIS PHONE ANYWAY Neighbors' Phone.

ANY OTHER Questions Just answer something in that case try to remember what you were asked and what you answered.

*DOES HE HAVE RELATIVES OR FRIENDS IN THE U.S. THAT YOU KNOW OF-NO-

When asked who wrote the document, Denson said that she did not know.[8]

As part of the inspection process, Friedland queried the Treasury Enforcement Communications System (TECS)[9] computer data base for any information

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8. Friedland immediately asked Denson to write down the answers to her questions on her tablet of paper so that Friedland could compare the handwritings. The handwriting samples did not match. At the hospital the next evening, Denson informed Friedland that she had in fact written the document and that it appeared to be written by someone else because she had seven different handwritings. At trial, Denson said that she did not write the script but that Osmond wrote it for her.

9. TECS is a computerized system that displays if a person entering the United States is on terrorist alert, suspected of narcotics trafficking or money laundering, a probation violator, has any outstanding warrants, or is in violation of other laws.

concerning Denson. The query returned a TECS alert stating the following:

> REFER TO CUSTOMS FOR ENFORCEMENT EXAM. ACQUIRED TRAVEL DOCUMENTS SHORTLY BEFORE DEPARTURE. MATCHES HI RISK NARCO-TARGETING INDICATORS. (IF ARRIVING FROM A SOURCE COUNTRY).

Customs Inspector Katherine Romanac entered the TECS alert at the Miami International Airport on November 1, 1996. For a ninety-day period thereafter, inspectors would automatically refer Denson to a secondary inspection station were she to arrive in the United States from a source county. Though the original ninety-day lookout for Denson expired on January 30, 1997, the TECS report remained in the system for one year and continued to have significance in assessing whether Denson was smuggling drugs into the United States.

After further questioning, Denson told Friedland that she had traveled to Jamaica with a friend, Shelita Jacobs. Denson also stated that she had visited with another friend, Coreen, in Jamaica, but could not recall her last name. Friedland was unable to confirm in the computer database that Jacobs had been traveling with Denson. At this point, based on her twenty-one years of experience as a Customs inspector, Friedland concluded that Denson was likely carrying narcotics inside her body.

Appendix A

Approximately fifteen minutes after Friedland completed her questioning, Denson requested to use the restroom. Friedland consented, but because she was aware that narcotics couriers frequently try to dispose of narcotics in the restroom, Friedland, with supervisory approval, conducted a routine *Terry*[10] pat down. Friedland and Customs inspector Linda Banks then escorted Denson to the restroom, leaving the stall door open while Denson urinated. Afterwards, consistent with Customs procedures, Friedland inspected the toilet paper, contents of the toilet, and Denson's undergarments to ensure that she was not disposing of narcotics or other evidence. After they returned from the restroom, Friedland placed Denson in handcuffs and inventoried her property. Friedland read Denson her *Miranda*[11] rights and asked her to sign a waiver, which she refused to do. Friedland then received supervisory approval from then Acting Port Director Lee Lavenka[12]

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10. *See Terry v. Ohio*, 392 U.S. 1, 30-31, 88 S.Ct. 1868, 1880-84, 20 L.Ed.2d 889 (1968) (holding that an officer may stop an individual and conduct a limited search if the officer forms a reasonable suspicion that the individual is engaging in, has engaged in, or is about to engage in illegal activity). Friedland conducted the pat down in the Customs secondary station search room in the presence of Customs Inspector Linda Banks.

11. *See Miranda v. Arizona*, 384 U.S. 436, 478-79, 86 S.Ct. 1602, 1630, 16 L.Ed.2d 694 (1966) (holding that statements made by a suspect in police custody are admissible at trial only if an officer has informed the suspect of his right to counsel and his right against self-incrimination and the suspect knowingly waived those rights).

12. Levenka was a Supervisory Customs Inspector acting as Port Director in the Director's temporary absence.

to transport Denson to Jackson Memorial Hospital[13] as a suspected internal narcotics courier. Lavenka based her decision on the totality of the facts and circumstances as gathered and reported by Friedland. Shortly thereafter, Customs inspector Selwyn Smith drove Friedland, Banks, and Denson to Jackson Memorial Hospital in Miami, located approximately twenty miles away from the Fort Lauderdale airport.

After arriving at the hospital's custody ward ("Ward D"), intake staff photographed Denson and had her change into hospital clothes. Friedland, Smith, and a hospital technician then escorted Denson to the maternity ward for an examination. At the registration desk, Denson refused to sign a treatment consent form, stating that she would not be responsible for paying any bill resulting from her stay. After Denson provided a urine sample to confirm her pregnancy, the hospital staff placed her in a hospital bed and Friedland handcuffed her to the bed rail.

With Friedland present, an obstetrician examined Denson by performing a pelvic examination and an obstetrical ultrasound. Though the examinations were negative for drugs, they did not rule out the possibility that Denson was smuggling drugs in her alimentary

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13. The U.S. Customs Service and Jackson Memorial Hospital had a standing arrangement whereby the hospital provided medical services to patients whom Customs suspected of smuggling contraband internally. Several inspectors also staffed an office Customs maintained at the hospital.

canal.[14] Because physicians cannot perform x-ray examinations during pregnancy, Friedland and Smith returned Denson to Ward D for monitored bowel movements.[15]

Under the standard protocol Jackson Memorial Hospital established in conjunction with the U.S. Customs Service, Denson was required to pass three separate drug-free stool samples. To help induce the bowel movements, a doctor prescribed Denson the laxative GoLytely.[16] After drinking the laxative, Denson had three drug-free bowel movements, the last of which occurred on February 16, 1997, at 9:45 a.m.[17] Thereafter,

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14. Friedland informed Lavenka of the negative pelvic exam and Lavenka authorized Denson's continued detention for monitored bowel movements.

15. Arriving at Ward D, Friedland again handcuffed Denson to the bedrail in her room.

16. Denson testified at trial that Friedland told her that she had to drink the laxative and pass three clear stools or she was not going to be able to leave. When Denson expressed concern about taking the laxative, Friedland responded that the doctors would not have prescribed her medication that they did not think she could have. Friedland denied making these statements.

17. Inspector Smith's shift ended shortly before midnight on February 14; he did not have further contact with Denson. While it is unclear from the record when Friedland left the hospital on the night of the 14th, she returned the next afternoon and supervised Denson's second bowel movement at 4 p.m. Friedland's shift ended later that evening; she returned the next morning, February 16, to transport Denson back to the airport following her release.

Customs Inspector Ganz informed Denson that she was to be released and proceeded to remove Denson's handcuffs and allowed her to dress. Hospital staff discharged Denson and Inspectors Friedland and Peggy Neaves drove her back to the Fort Lauderdale International Airport. At the airport, Denson retrieved her property and continued on her way. On February 28, 1997, Denson gave birth to Jordan L. Taylor.

B.

1.

Denson brought this lawsuit on November 12, 1998.[18] Her complaint [19] named as defendants Vince Priore, U.S. Customs Service Port Director for the Fort Lauderdale International Airport, Lee Levenka, Supervisory Customs Inspector, and Dennis Flynn and Cheryl

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18. Denson brought the suit individually and as guardian of Jordan L. Taylor. Under Florida law, a child who suffers prenatal injuries and is born alive has an independent cause of action against the alleged tortfeasor. *Day v. Nationwide Mut. Ins. Co.*, 328 So.2d 560, 562 (Fla. 2d DCA 1976). Nevertheless, since Jordan Taylor's tort claims are derivative of his mother's claims, we will focus on the allegedly tortious treatment of Denson.

19. We refer to Denson's Second Amended Complaint as the complaint. It was filed after a panel of this court reversed the district court's dismissal of the Hospital and the Hospital Defendants from the case and directed the district court to grant Denson leave to amend her complaint. *Denson v. United States*, 209 F.3d 724 (11th Cir.2000) (unpublished table decision).

Friedland, Customs Inspectors (collectively the "Federal Defendants"),[20] the United States, Jackson Memorial Hospital[21] and Ira Clark, its president (collectively the "Hospital"), and seven physicians[22] and six nurses[23] on the hospital's staff (collectively the "Hospital Defendants"). Denson's eleven-count complaint is a prolix, discursive pleading that combines causes of action and theories of recovery in such a way as to make it exceedingly difficult, if not impossible, to grasp precisely the claims being asserted. Reading the complaint in the light most favorable to Denson, we find that it presents and lumps together, in its eleven counts,

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20. The complaint sought damages against the Federal Defendants in both their individual and official capacities. The district court, in its orders finally disposing of the claims in this case, made no mention of the claims against the Federal Defendants in their official capacities. We thus assume that the court denied those claims *sub silentio*. In their briefs on appeal, the parties do not mention them.

21. Although the complaint named Jackson Memorial Hospital as a defendant, the complaint was served appropriately on Public Health Trust of Dade County, d/b/a Jackson Memorial Hospital.

22. The physicians were Drs. John Bennett, Alexander Amadio, Ricardo Presas, Maurizio Sepe, Jose Hernanedez, Gerald Kratz, and Lynn P. Carmichael.

23. The nurses were Illeana Hollant, Marie Prospere, Kenneth Reynauld, Gary Thompson, Doreen Simmons, and Gretchen Betlem.

a host of claims under the Constitution and Florida tort law.[24]

The first eighty-two paragraphs of the complaint contain allegations that apply to each of the eleven counts. These paragraphs detail the events that transpired from the moment Inspector Friedland stopped Denson, after Denson cleared the primary Customs checkpoint at the airport, to the birth of Jordan. Count I incorporates the eighty-two paragraphs by reference; Counts II through XI incorporate by reference all antecedent allegations, such that each count consists of an amalgamation of all previous counts and causes of action.[25]

The first eighty-two paragraphs of the complaint allege (1) that the conduct of the Federal Defendants

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24. Denson brought the claims against the Federal Defendants under 28 U.S.C. § 1331, the claims against the United States under 28 U.S.C. §§ 1331 and 1346(b)(1), the federal law claims against the Hospital Defendants and the Hospital under 28 U.S.C. §§ 1331 and 1343, and the state law claims against the Hospital and Hospital Defendants under 28 U.S.C. § 1367.

25. As indicated in the text following this footnote, the first 82 paragraphs of the complaint charge all of the defendants with every violation of the U.S. Constitution and Florida tort law that Denson allegedly suffered. Each numbered count, by incorporating those 82 paragraphs by reference, therefore asserts all of these violations. In an effort to eliminate the intractable problem of isolating Denson's claims and reducing them to their bare essentials, we have limited the claims presented in the several counts by using the counts' headings, *e.g.*, Count I, "Assault and Battery."

constituted "false arrest, false imprisonment, intentional infliction of emotional distress, unlawful search and seizure, and unlawful invasion of privacy, under the laws of the State of Florida" and the "Fourth, Fifth, Eighth, and Fourteenth Amendments" of the Constitution, and discrimination on the basis of "race and ethnicity . . . in violation of the laws of Florida and the Fourth and Fifth Amendments," and (2) that the conduct of the Hospital Defendants constituted "assault, battery, false imprisonment, intentional infliction of emotional distress, unlawful search and seizure, unlawful invasion of privacy, and medical negligence under the laws of Florida . . ." and "deliberate[ ] indifferen[ce] to [Denson's] serious medical needs . . . in violation of the Fifth, Eighth and Fourteenth Amendments." These eighty-two paragraphs also allege that "Defendants, and each of them, authorized and ratified the wrongful acts of the other individual defendants and were willful participants in the joint activity," all of which deprived Denson of her rights under Florida tort law and the federal constitution.

The counts alleged in the complaint are as follows: Count I, "Assault and Battery," brought against the Hospital Defendants, alleges that their physical contact with Denson at the hospital constituted assault and battery; Count II, "Medical Negligence," alleges that the Hospital Defendants breached the duty to provide Denson with appropriate medical care; Count III, "Medical Negligence," alleges that the Hospital is vicariously liable for the negligence of the Hospital Defendants; Count IV, "Apparent Agency," alleges that

the Hospital is vicariously liable for the acts of the Hospital Defendants; Count V, "Non-Delegable Duty," alleges that the Hospital is liable for the acts of the Hospitable Defendants because the duties of those defendants were non-delegable; Count VI, "42 U.S.C. § 1983 and § 1985 Claims," brought against the Hospital Defendants, alleges that, while acting under the color of state law and in concert, they unlawfully searched, seized and detained Denson with excessive force, depriving her of her liberty and due process of law, all in violation of her rights under the Fourth, Fifth, Eighth, and Fourteenth Amendments; Count VII, "42 U.S.C. § 1983 and § 1985 Claims," alleges that the Hospital is vicariously liable for the conduct described in Count VI; Count VIII, "Assault and Battery," alleges that the Federal Defendants "brutally, willfully, maliciously and without any excuse or justification . . . callously and recklessly . . . disregarded [Denson's] safety and continued life" in violation of Florida tort law; Count IX, "Constitutional Violations Claim," which we construe as a *Bivens* claim,[26] alleges that the Federal Defendants, acting in concert, deprived Denson of her Fourth Amendment rights to be free from unreasonable searches and seizures, excessive force, and unlawful detention and her Fifth Amendment rights to the equal protection of the laws, due process of law, the right of privacy, freedom of association, and the right to seek redress for injury; Count X, "Constitutional Violations Claim," another *Bivens* claim, alleges that U.S. Customs Service Port Director Priore, acting under color of state

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26. *See supra* note 1.

and federal law, failed appropriately to "train, supervise and/or discipline" the Federal Defendants and, therefore, is liable for the constitutional violations asserted in Count IX; and Count XI, "Claim under the Federal Tort Claims Act," alleges that the United States is amenable to suit under the Federal Tort Claims Act (FTCA),[27] because the Federal Defendants subjected Denson to "warrantless detention, searches, handcuffing, assault, battery, forced medication and improper treatment" in violation of Florida tort law and the Fourth, Fifth, Eighth, and Fourteenth Amendments to the Constitution.[28]

The U.S. Attorney responded to the complaint on behalf of the United States and the Federal Defendants[29] by filing an answer, which denied paragraph by paragraph the allegations of unlawful conduct.[30] As an

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27. *See supra* note 1 and accompanying text.

28. Count XI's assertions that the Federal Defendants infringed Denson's rights under these constitutional amendments duplicated Count IX's *Bivens* claims. And, moreover, it was inappropriate to place these constitutional allegations in Count XI because the FTCA does not provide jurisdiction for redress of constitutional torts.

29. The U.S. Attorney's Office for the Southern District of Florida represented both the United States on Count XI, and the Federal Defendants on Counts IX and X, respectively.

30. Given the manner in which Denson pled her complaint, the U.S. Attorney and the district court understandably had difficulty discerning which claims of which counts fell within

(Cont'd)

affirmative defense, the answer asserted that, with respect to the constitutional claims of Counts IX and X, the Federal Defendants were entitled to qualified immunity. The Hospital and Hospital Defendants responded by moving the court to grant them summary judgment on all claims.[31] Regarding the § 1983 claims asserted in Counts VI and VII, these defendants contended that they were entitled to qualified immunity.

On January 29, 2002, the district court entered an order disposing of all pending motions for summary

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(Cont'd)
the ambit of the FTCA, which claims were based on violations of Florida tort law, and which were based on violations of the U.S. Constitution. As a result, the U.S. Attorney had the United States substituted under the FTCA with respect to claims not covered by the FTCA, *i.e.*, constitutional claims against the Federal Defendants. For example, the district court at some point during the litigation incorrectly combined Count IX, based on the U.S. Constitution, with Count XI, based on Florida tort law and the U.S. Constitution, and substituted the United States as the defendant. The court treated Count X, a negligence claim against Priore, as a constitutional claim, and therefore did not substitute the United States for Priore as the defendant in that count. In this opinion, we have treated as claims against the United States only those asserting liability under Florida tort law.

31. These defendants also moved the district court to dismiss Denson's claims under Fed.R.Civ.P. 12(b)(6). We are unable to determine from the record whether the court ever ruled on the motion.

judgment.[32] The court granted summary judgment on Count I,[33] part of Count VI,[34] Counts VII and VIII,[35] part

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32. In addition to disposing of the defendants' motions for summary judgment, the court struck the complaint's references to 42 U.S.C. § 1985 because none of the complaint's allegations supported a claim under § 1985.

33. The court granted summary judgment in favor of the Hospital Defendants on the ground that Fla. Stat. § 768.28 granted them immunity. *See Jaar v. Univ. of Miami*, 474 So.2d 239, 245 (Fla. 3d DCA 1985) (applying § 768.28 immunity to doctors employed by the Public Health Trust of Miami Dade County d/b/a Jackson Memorial Hospital).

34. The district court disposed of the Count VI claims as follows: it dismissed (1) the claims Denson brought as guardian of Jordan L. Taylor; (2) the claims brought under 42 U.S.C. § 1985 against the Hospital and Hospital Defendants (for failure to prove a conspiracy among any of them); (3) the claims brought under 42 U.S.C. § 1983 against the Hospital and Hospital Defendants for non-consensual medical treatment; and (4) the claims brought under § 1983 against Drs. Amadio, Presas, Sepe, Hernandez, and Kratz and nurse Betlem for deliberate indifference to Denson's serious medical needs. The court granted in part and denied in part nurse Simmons's motion for summary judgment, dispositions we treat together as the denial of summary judgment. The court denied Dr. Bennett and nurses Hollant and Prospere summary judgment, and for, reasons not apparent in the January 29 order, did not rule on whether Dr. Carmichael or nurses Reynauld and Thompson were entitled to summary judgment.

35. The court granted summary judgment on Count VIII, the assault and battery claims against the Federal Defendants, on the ground that, at the time of the alleged assault and battery,

(Cont'd)

of Count IX,[36] and Count X, and denied summary judgment on Counts II through V[37] and part of Count II, as it related to four of the Hospital Defendants, Dr.

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the Federal Defendants were acting within the scope of their authority; therefore, the United States should be substituted as the defendant in lieu of the Federal Defendants. Because the Count XI claim against the United States was based in part on Count VIII's assault and battery allegations, the court found no need for Count VIII. Rather than dismissing Count VIII as duplicative of Count XI, however, the court granted the Federal Defendants summary judgment on Count VIII. The court apparently overlooked the fact that Count XI not only alleged assault and battery claims against the Federal Defendants, which were covered by the FTCA, but Fourth, Fifth, Eighth, and Fourteenth Amendment claims against them as well, which were not covered by the FTCA (because they were not based on Florida tort law) and which the United States therefore had no obligation to defend. Nonetheless, the U.S. Attorney assumed, albeit erroneously, that the United States could be held liable on those constitutional claims under the FTCA and, therefore, undertook to defend them on behalf of the United States.

36. The court granted the Federal Defendants summary judgment on Denson's claim as guardian of Jordan L. Taylor and on Denson's claim that the luggage search and pat down at the second Customs checkpoint infringed Denson's constitutional rights.

37. The Hospital Defendants argued that the district court lacked subject matter jurisdiction to entertain these claims. The district court disagreed, concluding that it had supplemental jurisdiction under 28 U.S.C. § 1367 to litigate the claims; it therefore denied the Hospital Defendants' motion for summary judgment.

Bennett and nurses Hollant, Prospere, and Simmons (the "Four Hospital Defendants"), and part of Count IX.[38] In denying the Four Hospital Defendants summary judgment on Count VI, the court declined to pass on the question of whether they were entitled to qualified immunity.

2.

The Federal Defendants appealed the January 29 order,[39] arguing that the district court erred in denying them qualified immunity as to the *Bivens* claims asserted in Count IX. The Hospital and the Hospital Defendants also appealed, arguing that the court erred in denying them summary judgment on Counts II through V. Additionally, the Four Hospital Defendants appealed on the ground that the court erred in failing to address whether they were entitled to qualified immunity on Count VI. Denson cross appealed, arguing that the court erred in granting any of the defendants summary judgment.

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38. The court denied summary judgment on the claim that Federal Defendants Friedland, Lavenka, and Flynn infringed Densons' constitutional rights in conducting the bathroom search at the airport and the pelvic examination at Jackson Memorial Hospital and in detaining Denson at the hospital for 24 hours. The court did not pass on the question of whether these three defendants were entitled to qualified immunity.

39. The Federal Defendants filed their notice of appeal on March 28, 2002. Because the United States is a party in the case, their appeal had to be filed within 60 days of the entry of the January 29 order. *See* Fed. R.App. P. 4(a)(1)(B).

Appendix A

In an order entered on July 12, 2002, a panel of this court granted Denson's motion to dismiss the Hospital and Hospital Defendants' appeal of the district court's denial of summary judgment on Counts II through V. On January 29, 2003, the panel affirmed the district court's rulings on Count IX and, with respect to Count VI, remanded the case with instructions that the district court consider whether the Four Hospital Defendants were entitled to qualified immunity. *See Denson v. United States*, 61 F. App'x 669 (11th Cir.2003) (unpublished table decision).

On remand, the district court, in an order entered on November 5, 2004, concluded that the Four Hospital Defendants were entitled to qualified immunity and granted them summary judgment on Count VI. Since this ruling disposed of all the remaining bases for the court's exercise of original jurisdiction on Denson's claims against the Hospital Defendants and the Hospital,[40] the court declined to exercise its supplemental jurisdiction over Denson's remaining state law claims stated in Counts II, III, IV, and V; thus, it dismissed those counts in its November 5 order.[41]

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40. In its January 29, 2002 order, the district court granted the Hospital summary judgment on Count VII, over which it had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. Sections 1331 and 1343 also provided the court with jurisdiction to entertain Count VI.

41. The November 5 order did not state that the dismissals were without prejudice. We assume that the dismissals were without prejudice because the order noted that Denson could

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Denson appealed the district court's November 5 order on December 2, 2004. On January 18, 2005, while her appeal was pending, she moved the district court, pursuant to Federal Rule of Civil Procedure 54(b), to enter a partial final judgment for the Hospital and Hospital Defendants in conformance with the rulings the court had handed down in their favor in its orders of January 29, 2002 and November 4, 2004.[42] Denson's motion stated that there was "no just cause for delay" in entering the partial final judgment; moreover, a judgment, if entered, would afford Denson an opportunity to obtain "appellate review of the qualified immunity issues at this time."[43] The court granted her

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continue pursuing her state law claims against the Hospital and Hospital Defendants in the Circuit Court of Dade County, Florida. *See Denson v. Public Health Trust of Dade County*, Case No. 99-3722.

42. Denson moved the district court for the entry of a partial final judgment under Fed.R.Civ.P. 54(b) because this court had questioned the parties as to whether this court had jurisdiction to entertain the interlocutory appeal Denson had taken on December 2, 2004. On March 17, 2005, we dismissed Denson's interlocutory appeal for lack of an appealable order. The order of dismissal stated: "The district court's November 5, 2004 order is not final and appealable as it does not resolve all claims of all parties, and was not certified for an immediate appeal pursuant to Fed.R.Civ.P. 54(b)." *Denson v. United States*, No. 04-16392 (11th Cir. Mar. 17, 2005).

43. A partial final judgment would also allow appellate review of the part of the November 5 order dismissing Counts II through V.

motion, as framed, entering a partial final judgment for the Hospital and Hospital Defendants on February 16, 2005. Denson did not appeal the partial final judgment.

What remained of Denson's complaint following the entry of the Rule 54(b) judgment were Count IX, the *Bivens* claims against Inspectors Friedland, Lavenka, and Flynn for infringing Denson's rights under the Fourth and Fifth Amendments, and Count XI, the FTCA claims against the United States based on Florida tort law and the Fourth, Fifth, Eighth and Fourteenth Amendments to the Constitution.

3.

On April 18, 2005, the case proceeded to a bifurcated trial on Counts IX and XI.[44] The two counts were tried simultaneously-Count IX to a jury[45] and Count XI to the court. On April 21, after three days of testimony, Denson voluntarily dismissed her claims against Inspector Flynn for lack of evidence[46] and rested her case on the two

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44. By agreement, the parties, with the court's consent, bifurcated Denson's claims and limited the trial to the issues of liability.

45. Denson had made a timely demand that her *Bivens* claims be tried to a jury. By statute, FTCA claims are tried to the bench. *See* 28 U.S.C. § 2402.

46. Nothing in the pretrial or trial records indicates that Flynn played a role in any way, directly or indirectly, in any of the events on which Denson based her claims against any of the defendants named in her complaint.

counts.[47] The U.S. Attorney then moved the district court for judgment as a matter of law on both counts.[48] He argued for judgment on the Count IX claims on the ground that Friedland and Lavenka were entitled to qualified immunity; and he argued for judgment on the Count XI claims on the ground that Denson had failed to make out a case of liability under Florida tort law.[49] The court reserved ruling on the motion as addressed

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47. Denson rested her case on Count XI subject to the court's reception of some documentary evidence, which she promptly introduced. Such evidence is not material to the disposition of her appeal of the judgment on Count XI.

48. The U.S. Attorney framed his motions for judgment as a matter of law as motions for "directed verdicts." We treat the motions as a Fed.R.Civ.P. 50(a) motion for judgment as a matter of law on Count IX and as a Fed.R.Civ.P. 52(c) motion for judgment on Count XI. The motions differ in this respect. A Rule 50(a) motion may be granted in the context here if the court, taking the evidence in the light most favorable to the plaintiff, concludes that a reasonable jury could not find for the plaintiff. *Rossbach v. City of Miami*, 371 F.3d 1354, 1356 (11th Cir.2004) (per curiam). A Rule 52(c) motion may be granted if, in the context here and based on the evidence before it, the court finds, after resolving the credibility issues and weighing the evidence, for the defendant. As it turned out, the court did not rule on the Rule 52(c) motion; instead, after both parties rested, it considered the evidence and made findings of fact and conclusions of law pursuant to Fed.R.Civ.P. 52(a).

49. Neither the parties nor the district court acknowledged the fact that Count XI included federal constitutional claims in addition to the Florida law tort claims. Rather, they limited, albeit tacitly, the constitutional claims to those asserted in Count IX.

to Count IX and denied the motion as addressed to Count XI. Then, after both parties rested, the district court proceeded to rule on the Count XI tort claims from the bench. The court found for the United States, and stated that it would memorialize its findings of fact and conclusions of law in a written order, pursuant to Federal Rule of Civil Procedure 52(a). Turning to the *Bivens* claims in Count IX, the court found that they were barred by 28 U.S.C. § 2676.[50] Denson objected to the

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50. 28 U.S.C. § 2676 provides:

> The judgment in an action under [the FTCA] shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

A majority of courts have construed § 2676 as barring a plaintiff's *Bivens* claims, irrespective of whether the *Bivens* and FTCA claims were brought in the same lawsuit. *Harris v. United States*, 422 F.3d 322, 334 (6th Cir.2005) ("[W]e have held that [§ 2676] applies even when the claims were tried together in the same suit and the judgments were entered simultaneously.") (alteration omitted); *Estate of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 858 (10th Cir.2005) (finding that entering judgment on *Bivens* claim before rendering judgment on FTCA tort claim is "inconsequential" to the application of § 2676); *Farmer v. Perrill*, 275 F.3d 958, 962 (10th Cir.2001) (holding that § 2676 barred *Bivens* claim because an FTCA claim based on same subject matter was adjudicated in an earlier proceeding); *Rodriguez v. Handy*, 873 F.2d 814, 816 (5th Cir.1989) (" 'The moment judgment was entered against the government, then by virtue of § 2676, [defendant] was no longer answerable to [claimant] for damages.' ") (quoting

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court's invocation of the § 2676 bar on grounds that the bar only applies to cases where the United States is unsuccessful in defending against the FTCA claim.[51]

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Arevalo v. Woods, 811 F.2d 487, 490 (9th Cir.1987)); *Aetna Cas. & Sur. Co. v. United States*, 570 F.2d 1197, 1201 (4th Cir.1978) ("[A] judgment against the United States would automatically bar the entry of any contemporaneous or subsequent judgment against [government officials].").

Most courts have also found that § 2676 does not distinguish between judgments entered for or against the United States. *Trentadue*, 397 F.3d at 858 ("[T]he judgment bar in § 2676 precludes plaintiffs from bringing a *Bivens* claim regarding the same subject matter regardless of whether the final FTCA judgment is rendered in favor of a plaintiff or the government."); *Farmer*, 275 F.3d at 963 ("Section 2676 makes no distinction between favorable and unfavorable judgments-it simply refers to 'the judgment in an action under section 1346(b).' "); *Hoosier Bancorp of Ind., Inc. v. Rasmussen*, 90 F.3d 180, 185 (7th Cir.1996) ("There is no indication that Congress intended [s]ection 2676 to apply only to favorable FTCA judgments."). *But see Kreines v. United States*, 959 F.2d 834, 838 (9th Cir.1992) (holding that § 2676 does not bar a *Bivens* claim where the court enters judgment in favor of the United States under the FTCA and the *Bivens* claim and FTCA claim are filed "contemporaneously").

51. Denson did not object to the bar on the ground that it deprived her of her Seventh Amendment right to a jury trial on her *Bivens* claims.

4.

On June 30, 2005, Denson moved the district court, pursuant to Federal Rule of Civil Procedure 60(b), to reconsider its November 5, 2004 order, which granted the Four Hospital Defendants summary judgment on Count VI, and dismissed Counts II through V. Denson also moved the court to set aside the Rule 54(b) partial final judgment of February 16, 2005, contending that the judgment was invalid because it failed to recite that there was "no just reason for delay" in entering the judgment.

5.

On August 5, 2005, the court issued its findings of fact and conclusions of law on the Count XI FTCA claims. The court found (1) that Inspector Friedland had reason to suspect that Denson was carrying narcotics internally; (2) that Denson's responses to the questions Friedland put to her heightened Friedland's suspicion; (3) that Friedland acted properly in seeking direction from her supervisor, Lavenka (4) that, based on what Friedland reported, Lavenka properly instructed Friedland to take Denson to the Hospital, and; (5) that Friedland's handling of Denson at the Hospital was consistent with the protocol the U.S. Customs Service followed in dealing with border entrants, like Denson, suspected of carrying narcotics internally. The court concluded that, based on these facts, neither Friedland nor Lavenka committed the state law torts alleged in the complaint, and that the United States was entitled to judgment on Count XI.

After finding for the United States on Count XI, the district court, on August 22, 2005, entered an order dismissing Count IX on the ground that Denson's *Bivens* claims were barred by 28 U.S.C. § 2676.

On August 24, 2005, the court denied Denson's Rule 60(b) motion to reconsider its November 5, 2004 order. On September 2, 2005, the U.S. Attorney moved the district court for entry of judgment in favor of Friedland and Lavenka on Count IX, pursuant to its August 22 order dismissing that count. On October 4, 2005, the court, having reserved ruling on Friedland and Lavenka's motions for judgment as a matter of law on Count IX, entered an order granting the motions on qualified immunity grounds. On October 6, 2005, the court entered final judgments in favor of Friedland and Lavenka on Count IX and the United States on Count XI. On October 11, 2005, the court denied Denson's June 30, 2005 motion to set aside the Rule 54(b) judgment.

6.

On October 12, 2005, Denson appealed the October 6 judgments and the August 24, 2005 order denying her Rule 60(b) motion for reconsideration of the court's November 5, 2004 order. Denson's appeal of the August 24 order is meritless, as we explain in the margin,[52] and

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52. Fed.R.Civ.P. 60(b) authorizes a district court to relieve a party from a "final judgment, order, or proceeding." As we stated in our March 17, 2005 order dismissing Denson's appeal of the November 5 order, the November 5 order was not "final," (Cont'd)

thus unworthy of further comment. We devote our attention, instead, to Denson's challenges to the October 6 judgments.

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and therefore not appealable, because the order had not resolved "all claims of all parties." *Denson v. United States*, No. 04-16392 (11th Cir. March 17, 2005). The November 5 order was merely tentative. The district court should have denied Denson's Rule 60(b) motion for the obvious reason that the November 5 order was not final. The November 5 order was superceded and therefore, made final by the Rule 54(b) judgment entered on February 16, 2005. Denson did not appeal that judgment. True, she moved the court on June 30, 2005, to set it aside because the order did not recite the statutory language that there was "no just reason for delay" for granting the motion, but the court denied the motion. She apparently overlooked the fact that her motion represented to the district court that there was "no just cause for delay," and that the court accepted her representation in granting the motion as framed. Under the circumstances, the fact that the court's order granting the Rule 54(b) judgment failed to contain the magic words, "no just reason for delay," did not render the judgment invalid. *Crowley Mar. Corp. v. Panama Canal Comm.*, 849 F.2d 951, 953 (5th Cir.1988) (holding that district court was not required to recite the language "no just reason for delay," because party's motion contained such language; thus, district court's intent in issuing partial final judgment was readily apparent); *St. Paul Fire and Marine Ins. Co. v. PepsiCo, Inc.*, 884 F.2d 688 (2d Cir.1989) (finding that court could exercise appellate jurisdiction in spite of the district court's failure to recite the statutory language if the record demonstrates that the district court could easily have provided acceptable reasons for granting the motion).

II.

A.

Denson brought her Fourth Amendment claims against the Federal Defendants under *Bivens*, and state law claims against the United States (substituted for the Federal Defendants) under the FTCA.[53] In *Bivens*, the Supreme Court created a remedial scheme to enforce justiciable constitutional rights. *See Bivens*, 403 U.S. at 395, 91 S.Ct. at 2004-05 (finding that victims of constitutional violations may seek monetary damages against the offending federal officers). In contrast, the FTCA "is not a federal remedial scheme at all, but a waiver of sovereign immunity that permits an injured claimant to recover damages against the United States where a private person 'would be liable to the claimant in accordance with the law of the place where the act or omission occurred.' " *Carlson v. Green*, 446 U.S. 14, 29 n. 1, 100 S.Ct. 1468, 1477 n. 1, 64 L.Ed.2d 15 (1980) (Powell, J., concurring) (quoting 28 U.S.C. § 1346(b)). Although the FTCA was enacted many years before the *Bivens* decision came down, when Congress amended the FTCA in 1974 to permit claimants to bring causes of action against the United States based on intentional torts committed by law enforcement officers, *see* Pub.L. No. 93-253, 88 Stat. 50 (1974), Congress indicated that

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53. Denson also claimed that the Federal Defendants infringed her rights under the Fifth and Eight Amendments to the Constitution. In her brief, she does not mention those amendments; thus, we treat her Fifth and Eight Amendment claims as abandoned.

it viewed the FTCA and *Bivens* as parallel and complementary causes of action:

> [A]fter the date of enactment of this measure, innocent individuals who are subjected to raids [like those described in *Bivens*] will have a cause of action against the individual Federal agents and the Federal Government. Furthermore, this provision should be viewed as a counterpart to the *Bivens* case and its progenty [sic.], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages [under state law] for the same type of conduct that is alleged to have occurred in *Bivens* (and for which that case imposes liability upon the individual Government officials involved).

S.Rep. No. 93-588 (1974), *reprinted* in 1974 U.S.C.C.A.N. 2789, 2791; *Pooler v. United States*, 787 F.2d 868, 874 (3d Cir.1986) (Seitzer, J., concurring) (noting that Congress crafted the law enforcement proviso amendment to § 2680(h) to be co-extensive with actions brought under *Bivens*); *see also Carlson v. Green*, 446 U.S. at 20, 100 S.Ct. at 1472 (holding that plaintiffs, "[i]n the absence of a contrary expression from Congress, . . . shall have an action under FTCA against the United States as well as a *Bivens* action against the individual officials alleged to have infringed their constitutional rights"); *cf. FDIC v. Meyer*, 510 U.S. 471, 485, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994) (explaining that the Court "implied a cause of action against federal officials in

Bivens in part because a direct action against the government was not available [under the FTCA]" to remedy constitutional tort claims)

As co-extensive causes of action, *Bivens* and FTCA claims necessarily arise from the same wrongful acts or omissions of a government official. By the same token, the same set of facts determines the theories available to the United States in defending the FTCA case. If a plaintiff sues the official under *Bivens*, but fails to establish a constitutional violation, the United States may defend the plaintiff's state-law tort claims (based on the *Bivens* evidence) under two theories. First, the United States may contend that 28 U.S.C. § 2680(a) of the FTCA strips the district court of jurisdiction to consider the tort claims because the officer acted within the scope of his discretion when he engaged in the disputed conduct.[54] Second, the United States may contend that the Supremacy Clause of the Constitution bars the tort claims because the application of the state

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54. 28 U.S.C. § 2680(a) provides an exception from the government's waiver of sovereign immunity for,

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

tort law would impede the officer from performing his required federal functions. *See* U.S. Const, art. VI, cl.2 (providing that federal law is the supreme law of the land). However, because government officials lack discretion to violate constitutional rights, if the *Bivens* claim is successful, neither defense would be available to the United States in the FTCA case. *See Medina v. United States*, 259 F.3d 220, 225 (4th Cir.2001) (noting that the starting point of analysis is the axiom that "federal officials do not possess discretion to violate constitutional rights or federal statutes"); *Red Lake Band of Chippewa Indians v. United States*, 800 F.2d 1187, 1196 (D.C.Cir.1986) ("A government official has no discretion to violate the binding laws, regulations, or policies that define the extent of his official powers.").[55]

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55. That the discretionary function exception of § 2680(a) would not be available to the United States when it is sued under the FTCA is implicit in the Supreme Court's holding in *Carlson v. Green*. By holding that the victim of a constitutional tort committed by a government official has "parallel, complementary causes of action" under *Bivens* and § 2680(h) of the FTCA, the Court necessarily implied that the discretionary function exception of § 2680(a) does not apply to bar the district court from adjudicating the FTCA cause of action. *See Carlson*, 446 U.S. at 20, 100 S.Ct. at 1472. In other words, in committing a constitutional tort, a government official is not, "exercis[ing] or perform[ing], or . . . fail[ing] to exercise or perform a discretionary function or duty." *See* § 2680(a). Conversely, if the government official's conduct does not violate the Constitution (or a federal statute or regulation), the discretionary function exception may apply and preclude the district court from adjudicating whether the same evidence that failed to establish

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that the official violated the Constitution (or a federal statute or regulation) nonetheless established a tort under state law, *e.g.*, false arrest or false imprisonment.

In *Nguyen v. United States*, 556 F.3d 1244 (11th Cir.2009), a case where DEA agents infringed the plaintiff's Fourth and Fifth Amendment rights by subjecting the plaintiff to false arrest and malicious prosecution, a panel of this court suggested that the discretionary function exception would not apply even had the agents not violated the plaintiff's constitutional rights. The plaintiff in *Nguyen* did not sue the federal agents under *Bivens*; instead, he sued the United States under § 2680(h) for false arrest and false imprisonment. Although the facts of the case demonstrated a clear constitutional violation, the district court dismissed the case under § 2680(a)'s discretionary function exception. This court reversed. Implementing a purposive approach to statutory construction, *see* H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1411 (tent. ed. 1958) (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994) (arguing that primary concern in statutory construction is to give effect to the purpose of the statute; not the plain text), this court found that the exception did not apply, *see Nguyen*, 556 F.3d at 1256 ("To hold in this case that the discretionary function exception in subsection (a) trumps the specific proviso in subsection (h) would defeat what we know to be the clear purpose of the 1974 amendment."), implicitly indicating that the exception would not have applied even had the agents not violated the Constitution.

As indicated in part III, *infra*, we conclude that the Supremacy Clause bars Denson's FTCA tort claims. Consequently, we need not consider whether § 2680(a) is implicated where, as here, the government officials properly discharged their statutory and regulatory duties within the bounds fixed by the Constitution.

In the scenario at hand, the availability of these defenses to the United States in the FTCA case depends on whether the evidence Denson presented against Inspectors Friedland and Lavenka in the *Bivens* case was sufficient to withstand their motion for judgment as a matter of law. Given this consequence, we begin our review of the two cases by assessing the legal sufficiency of Denson's *Bivens* case.

B.

Denson sued Inspectors Friedland and Lavenka in their individual capacities. At trial, after Denson rested her case, the U.S. Attorney, contending that the defendants were entitled to qualified immunity as a matter of law, moved the court to dismiss her *Bivens* claims under Federal Rule of Civil Procedure 50(a).[56] The court granted the motion.[57]

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56. The complete text of Rule 50(a) is as follows:

(a) Judgment as a Matter of Law.

(1) In General. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

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Qualified immunity is a doctrine that generally shields "[g]overnment officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982); *see also Anderson v. Creighton*, 483 U.S. 635, 638-39, 107 S.Ct. 3034, 3038-39, 97 L.Ed.2d 523 (1987); *Wood v. Kesler*, 323 F.3d 872, 877 (11th Cir.2003). Thus, a government official is shielded from liability in two scenarios: (1) the claimant fails to establish that the official violated her rights; or

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> (2) Motion. A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

57. The district court alternatively ruled that 28 U.S.C. § 2676 barred Denson's *Bivens* claims. Because, as indicated *infra*, we conclude that Denson failed as a matter of law to establish that the defendants infringed her constitutional rights and that her *Bivens* claims should have been dismissed under Rule 50(a) for that reason, we need not address the § 2676 issue. *See Koziara v. City of Casselberry*, 392 F.3d 1302, 1306 n. 2 (11th Cir.2004) ("[W]e may affirm the district court's judgment on any grounds supported in the record.").

We come to the decision that Denson failed to establish her *Bivens* claims by "applying the same standard as the district court." *Cleveland v. Home Shopping Network, Inc.*, 369 F.3d 1189, 1192 (11th Cir.2004). In doing so, we view the evidence in the light most favorable to Denson, the nonmovant. *Thosteson v. United States*, 331 F.3d 1294, 1298 (11th Cir.2003).

(2) the claimant establishes a violation of rights that are not "clearly established." *See Pearson v. Callahan*, __ U.S. __, 129 S.Ct. 808, 818, 172 L.Ed.2d 565 (2009). Denson's case fits the first scenario hand in glove, as we explain below.

1.

The Fourth Amendment is a classic repository of constitutional rights. It serves as a bulwark, protecting individual liberty from arbitrary invasions by state actors. *See Wolf v. People of State of Colorado*, 338 U.S. 25, 27-28, 69 S.Ct. 1359, 1361, 93 L.Ed. 1782 (1949), *overruled on other grounds by Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). To that end, the proscriptions found in the Fourth Amendment impose a benchmark of reasonableness upon the exercise of governmental discretion. *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660 (1979); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312, 98 S.Ct. 1816, 1820, 56 L.Ed.2d 305 (1978). Whether a search or seizure is constitutionally reasonable is judged by "balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *United States v. Montoya de Hernández*, 473 U.S. 531, 537, 105 S.Ct. 3304, 3308, 87 L.Ed.2d 381 (1985); *Brown v. Texas*, 443 U.S. 47, 50-51, 99 S.Ct. 2637, 2640, 61 L.Ed.2d 357 (1979); *Camara v. Municipal Court*, 387 U.S. 523, 534, 87 S.Ct. 1727, 1734, 18 L.Ed.2d 930 (1967).

While true that Fourth Amendment protections apply irrespective of a person's location, those protections do wane in some limited contexts. This is especially true at the international border—or its functional equivalent, *e.g.*, an airport[58]—where the government's interest in preventing persons and effects from entering the nation rises to its zenith. *United States v. Flores-Montano*, 541 U.S. 149, 152-53, 124 S.Ct. 1582, 1585, 158 L.Ed.2d 311 (2004). In fact, the very balance of reasonableness "is qualitatively different at the international border than in the interior." *Montoya de Hernández*, 473 U.S. at 538, 105 S.Ct. at 3309. "[N]ot only is the expectation of privacy less at the border than in the interior, the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is also struck much more favorably to the Government at the border." *Id.* at 539-40, 105 S.Ct. at 3309-10 (internal citations omitted). It is beyond peradventure that searches made at the border, pursuant to the long-standing right of the sovereign to protect its territorial integrity, renders preliminary searches and seizures *per se* reasonable simply by virtue of the fact that they occur at the border. *United States v. Ramsey*, 431 U.S. 606, 616, 97 S.Ct. 1972, 1978, 52 L.Ed.2d 617 (1977). Entrants, therefore, are subject to search even in the absence of reasonable suspicion,

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58. *See Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73, 93 S.Ct. 2535, 2539, 37 L.Ed.2d 596 (1973); *United States. v. Hill*, 939 F.2d 934 (11th Cir.1991) (holding that "[b]ecause people can enter the country at points other than along the actual border, courts look to whether the point of entry is the functional equivalent of the border.").

probable cause, or warrant. *Id.* at 619, 97 S.Ct. at 1980; *Almeida-Sanchez,* 413 U.S. at 272, 93 S.Ct. at 2539, 37 L.Ed.2d 596 (1973) (noting that the federal government may conduct "routine inspections and searches of individuals or conveyances seeking to cross our borders"); *Carroll v. United States,* 267 U.S. 132, 154, 45 S.Ct. 280, 285, 69 L.Ed. 543 (1925) ("Travelers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in and his belongings as effects which may be lawfully brought in.").

The Government's interest in policing our borders has grown exponentially in the present era of foreign drug trafficking. *See United States v. Mendenhall,* 446 U.S. 544, 561, 100 S.Ct. 1870, 1880, 64 L.Ed.2d 497 (1980) (Powell, J., concurring) (noting that the public "has a compelling interest" to stop the flow of illegal drugs from entering the United States). Stopping the flood of illicit drugs pouring into the United States has become particularly difficult as drug syndicates develop new techniques to prevent detection. One technique in the smuggler's repertoire, which has been utilized for more than three decades, is alimentary canal smuggling.[59] *See Montoya de Hernández,* 473 U.S. at 538-39, 105 S.Ct. at 3309. This dangerous and depraved practice remains a staple method for smuggling because it is exceedingly difficult to detect. *Id.*

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59. *See supra* note 2.

To combat the long existing and ever present problem of contraband smuggling, Congress expanded the Customs Office's scope of authority by enacting 19 U.S.C. § 1582.[60] This statute provides that "all persons coming into the United States from foreign countries shall be liable to detention and search . . . authorized . . . [by customs regulations]." Pursuant to its Congressionally delegated authority, U.S. Customs responded by drafting and adopting 19 C.F.R. §§ 162.6 and 162.7, which provide that "[a]ll persons, baggage, and merchandise arriving in the . . . United States from places outside thereof are liable to inspection" and that Customs officers "may stop, search, and examine any vehicle, person, or beast, or search any trunk or envelope wherever found."[61]

As a whole, the law provides that when Customs Officers first encounter an individual seeking entry into

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60. 19 U.S.C. § 1582 provides:

> The Secretary of the Treasury may prescribe regulations for the search of persons and baggage and he is authorized to employ female inspectors for the examination and search of persons of their own sex; and all persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents of the Government under such regulations.

61. Courts have explicitly deemed § 1582 and its implementing regulations constitutional. *United States v. Scheer*, 600 F.2d 5, 7 (3d Cir.1979); *United States v. Pringle*, 576 F.2d 1114, 1117 (5th Cir.1978); United States v. Odland, 502 F.2d 148, 151 (7th Cir.), *cert. denied*, 419 U.S. 1088, 95 S.Ct. 679, 42 L.Ed.2d 680 (1974).

the United States the officer has discretion to stop the person and conduct a preliminary border search without fear of running afoul of the Constitution. *Ramsey*, 431 U.S. at 619, 97 S.Ct. at 1980. Included within the officer's discretion is an entitlement to conduct routine questioning, *Kaniff v. United States*, 351 F.3d 780, 784 (7th Cir.2003), examine the entrant's luggage, and conduct *Terry* patdowns and frisks, *United States v. Vega-Barvo*, 729 F.2d 1341, 1345 (11th Cir.1984); *see also Bradley v. United States*, 299 F.3d 197, 203-04 (3d Cir.2002); *United States v. Beras*, 183 F.3d 22, 25-26 (1st Cir.1999); *United States v. Vargas*, 854 F.2d 1132, 1134 (9th Cir.1988); *United States v. Carreon*, 872 F.2d 1436, 1442 (10th Cir.1989); *United States v. Oyekan*, 786 F.2d 832, 835 (8th Cir.1986). Because an individual's expectation of privacy is at its lowermost at border entry points, the officer need not possess any level of suspicion. *Vega-Barvo*, 729 F.2d at 1344 ("A person's decision to cross our national boundary is justification enough for such a search."); *United States v. Gonzalez-Rincon*, 36 F.3d 859, 864 (9th Cir.1994) (finding that routine searches are reasonable under the Fourth Amendment "by the single fact that the person or item in question has entered into our country from outside.")

2.

When Denson entered the United States, Friedland stopped her, conducted a search of her belongings, asked her routine questions, and conducted a *Terry*-style pat down. These actions fall well within the scope of routine border searches and accordingly, do not

offend the Fourth Amendment. *See Brent v. Ashley*, 247 F.3d 1294, 1299-1300 (11th Cir.2001) (holding that the stop, questioning, and luggage search of an entrant constituted a routine border search); *Vega-Barvo*, 729 F.2d at 1345 ("Both a luggage search and a pat-down or frisk fall within [routine border searches] and these searches can be legitimately carried out on no more than a generalized 'mere suspicion' or 'subjective response' of the [C]ustoms inspector. A person's decision to cross our national boundary is justification enough for such a search."). Denson's suggestion that Friedland's initial actions were rendered unconstitutional because Friedland's decision to stop and search her was racially motivated is of no moment.

If, after conducting initial questioning and a preliminary search of the individual and the individual's effects, the officer has reasonable suspicion that the traveler is smuggling drugs in her alimentary canal, the Fourth Amendment permits the Customs officer to detain the individual and conduct a more intrusive search. *Montoya de Hernández*, 473 U.S. at 541-42, 105 S.Ct. at 3310-11 (allowing detention of traveler based on reasonable suspicion of smuggling contraband in her alimentary canal); *United States v. Pino*, 729 F.2d 1357, 1359 (11th Cir.1984) (finding use of x-ray to search traveler constitutional where reasonable suspicion exists that person is concealing drugs internally); *see United States v. Himmelwright*, 551 F.2d 991, 994 (5th Cir.) *cert.*

denied, 434 U.S. 902, 98 S.Ct. 298, 54 L.Ed.2d 189 (1977)[62] (permitting strip search of border entrant based upon reasonable suspicion). Similarly, once an officer gains reasonable suspicion that a traveler is smuggling drugs in her alimentary canal, it is constitutionally reasonable for the officer to detain the traveler for a period of time necessary to either verify or dispel his suspicion. *Montoya de Hernández*, 473 U.S. at 544, 105 S.Ct. at 3312; *Gonzalez-Rincon*, 36 F.3d at 864.

Whether reasonable suspicion exists to justify more intrusive searches is a fact specific inquiry, requiring courts to take into account all of the facts known to the officer at the time of the search. *United States v. Arvizu*, 534 U.S. 266, 273-74, 122 S.Ct. 744, 750-51, 151 L.Ed.2d 740 (2002). Taking the totality of the circumstances into account, "officials at the border must have a particularized and objective basis for suspecting the particular person of alimentary canal smuggling." *Montoya de Hernández*, 473 U.S. at 541-42, 105 S.Ct. at 3311. Reasonable suspicion requires more than mere fanciful conjecture; it must be based upon a "particularized and objective basis for suspecting the particular person . . . of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417-18, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981). Although this standard imposes limits on a Customs official's discretion after an individual has crossed the border, it relaxes the normal

62. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent the decisions of the former Fifth Circuit handed down prior to October 1, 1981.

warrant requirement of probable cause in recognition of the "many difficulties that attend the attempt[s] to intercept contraband and to apprehend increasingly mobile and sophisticated smugglers." *United States v. Bilir*, 592 F.2d 735, 739-40 (4th Cir.1979)

Recognizing that reasonable suspicion is a concept of a most feline character, the Supreme Court sought to provide some instruction on applying the concept in the border smuggling context in *Montoya de Hernández*. There, the Supreme Court found that Customs inspectors had reasonable suspicion to search and detain a woman traveling to the United States from Bogata, Colombia-a "source city" for illegal drugs according to Customs officials. *Montoya de Hernández*, 473 U.S. at 541, 105 S.Ct. at 3311. The woman first aroused suspicion when a Customs inspector noticed from her passport that she had made eight recent trips to either Miami or Los Angeles from Bogata. *See id.* at 533, 105 S.Ct. at 3306. After further questioning, the woman revealed that she did not speak English and had no family or friends in the United States. *Id.* She further revealed that she did not have a hotel reservation and she could not remember who purchased her airline ticket. *Id.* After searching her luggage, the inspector discovered the woman was carrying $5,000 in cash and was only carrying "cold weather" clothes. *Id.* at 533-34, 105 S.Ct. at 3306. Suspecting the woman of alimentary canal smuggling, he requested a female Customs inspector take the woman to a private area and perform a patdown and strip search. *Id.* at 534, 105 S.Ct. at 3307. Although the female inspector failed to find any

contraband, she did discover that the woman's abdomen was firm and full and she was wearing two pairs of elastic undergarments with a paper towel lining in the crotch area. *Id.* Based on all the facts and circumstances, the inspectors detained the woman for sixteen hours and, despite her "heroic efforts to resist the usual calls of nature," the inspectors discovered that the woman was carrying over eighty-eight balloons containing a total of 528 grams of cocaine in her alimentary canal. *Id.*

Similarly, in *United States v. Gonzalez-Rincon*, 36 F.3d 859 (9th Cir.1994), *cert. denied*, 514 U.S. 1008, 115 S.Ct. 1323, 131 L.Ed.2d 203 (1995), the Ninth Circuit found that Customs inspectors had reasonable suspicion that a traveler was an alimentary canal smuggler because she (1) was traveling from a source city (Bogata, Colombia), (2) had paid cash for her plane ticket, (3) was carrying only one piece of luggage, although she told the inspectors she was planning on staying in the United States for fifteen days, (4) gave inconsistent statements regarding the purpose of her trip, (5) her passport reflected numerous entries into the United States, and (6) she appeared nervous and perspired heavily while being interviewed. *Id.* at 863. These facts were sufficient to justify the Customs inspectors' decision to strip search the woman, x-ray her abdomen, and monitor her bowel movements. *Id.*

In this case, when Friedland decided to accompany Denson to the restroom and perform a search, she knew that Denson (1) had arrived from Jamaica, a "source country," (2) was a single traveler carrying no carry-on

luggage, (3) displayed signs of nervousness during questioning, (4) was pregnant and, accordingly, it was impossible for medical professionals to take an x-ray of her stomach or gastrointestinal tract—making her a desirable drug "mule," (5) provided inconsistent statements about the purpose of her trip, (6) stated she was married but could not provide her husband's phone number, (7) had only stayed in Jamaica for one and a half days, (8) provided a dubious story about how she attained her plane ticket, (9) gave unverifiable employment information, and (10) was in possession of a hand-written "cover story" written by someone else. Based on these facts, it was eminently reasonable for Friedland, especially given her experience and training, to suspect that Denson was concealing contraband. *See Gonzalez-Rincon*, 36 F.3d at 863.

Denson argues, however, that even assuming that Friedland had reasonable suspicion to conduct the restroom search,[63] her failure to find drugs during that search should have allayed her suspicion rather than given rise to the suspicion that she was carrying drugs internally. She insists that Friedland's decision (which was affirmed by the Acting Port Director, Lavenka) to detain her and have her taken to a hospital—so that

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63. Because we find that the Customs inspectors had a reasonable suspicion prior to the restroom search that Denson was an internal narcotics courier, we need not decide whether the particular search rose to the level of a "strip search." *See Vega-Barvo*, 729 F.2d at 1345 (asserting that a Customs officer must have a reasonable suspicion before conducting a strip search).

medical professionals and Customs officers could monitor her bowel movements-was based on nothing more than a classic drug courier profile, insufficient to support reasonable suspicion.

If we were to accept Denson's argument that the negative results of the searches should have allayed all suspicion, we would turn the reasonable suspicion standard on its head. Under Denson's theory, whether an officer possesses reasonable suspicion is measured by the result of the search and not the facts and circumstances that led to the officer's decision to conduct the search. Surely, Denson does not suggest that the absence of reasonable suspicion is constitutionally remedied if the officer discovers contraband during the search.

Eschewing such an *ex post* approach, the Supreme Court has consistently held that whether an officer has reasonable suspicion is determined by all the facts known to the officer before and during the search. *See Montoya de Hernández*, 473 U.S. at 541-42, 105 S.Ct. at 3311; *Arvizu*, 534 U.S. at 273-74, 122 S.Ct. at 750-51. The inspector's failure to discover drugs or other facts that would indicate alimentary canal smuggling—such as the traveler carrying antidiarrheal medication, *see United States v. Chukunubike*, 956 F.2d 209, 210 (9th Cir.1992), or wearing multiple pairs of undergarments lined with paper towels, *see Montoya de Hernandez*, 473 U.S. at 534, 105 S.Ct. at 3307—does not necessarily diminish a Customs inspector's suspicions. Indeed, an absence of proof is not proof of absence.

If, after considering all the facts and circumstances at hand, an experienced Customs inspector reasonably suspects that an individual is a drug smuggler, failing to find illicit drugs externally could raise a reasonable suspicion in the inspector's mind that the traveler is carrying drugs internally. *See United States v. Oyekan*, 786 F.2d 832, 834 (8th Cir.1986) (noting that even though strip search revealed no evidence of drugs or paraphernalia associated with alimentary canal smuggling, reasonable suspicion supported detention for x-ray and monitored bowel movements of two women from a source country who carried small amount of luggage, paid cash for tickets, and told implausible stories about their purpose for traveling to the United States); *Vega-Barvo*, 729 F.2d at 1350 (finding that inspectors had reasonable suspicion of internal smuggling and could proceed with an x-ray following a negative strip search where suspect was traveling alone from a source country, carried a single piece of luggage, and told an implausible story regarding her employment).

Once acquiring reasonable suspicion, Friedland, with Lavenka's approval, could legally detain Denson for "the period of time necessary to either verify or dispel the suspicion," including transporting Denson to the hospital for a pelvic exam and, if necessary, monitored bowel movements. *See Montoya de Hernandez*, 473 U.S. at 544, 105 S.Ct. at 3312, 87 L.Ed.2d 381; *United States v. De Montoya*, 729 F.2d 1369, 1371 (11th Cir.1984) (permitting Customs inspectors to detain suspect until he excreted his stomach's contents where inspectors

reasonably suspected narcotics trafficking); *United States v. Henao-Castano*, 729 F.2d 1364, 1366 (11th Cir.1984) (permitting officers to handcuff suspect to a chair because handcuffing "was a reasonable method of preventing [suspect] from attempting to dispose of the contents of his stomach before they could be searched."); *United States v. Saldarriaga-Marin*, 734 F.2d 1425, 1428 (11th Cir.1984) ("Once the Customs [O]fficers developed reasonable suspicion that [suspect] was an internal carrier, they could permit nature to run its course or ask [him] to speed up the process by taking [a] laxative"); *United States v. Himmelwright*, 551 F.2d 991, 995 (5th Cir.1977) (allowing strip and body cavity searches upon reasonable suspicion "that contraband exists in the particular place which the officials decide to search"); *Lane v. United States*, 321 F.2d 573, 576 (5th Cir.1963) (holding that "[a]dministering emetics to cause vomiting in order to recover narcotics is not an unreasonable search of the person.").[64]

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64. As both Friedland and Lavenka acknowledged, as a pregnant, black female traveling alone from a brief stay in Jamaica, Denson fit a stereotypical profile. And if Friedland and Lavenka based their decision to search and have Denson detained to monitor her bowel movements solely on those facts, this would be a different case. *See Brent v. Odesta*, 247 F.3d 1294, 1302 (11th Cir.2001) (finding officers lacked reasonable suspicion to conduct a strip search and an x-ray examination based on the traveler having arrived from a source country and shaking her head at inspectors who had detained another passenger); *United States v. Vega-Barvo*, 729 F.2d 1341, 1349 (11th Cir.1984) ("It is not the profile, however, but the factors which make up the profile which are crucial to whether or not

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We further note that our decision today promotes sound social policy and provides Customs inspectors a degree of flexibility and protection as they work to secure our borders. In this case, after confronting, questioning, and searching Denson, Friedland presented Lavenka with evidence supporting a reasonable suspicion that Denson was concealing drugs internally. At this point, the inspectors had a simple, but difficult, choice to make: subject the obviously pregnant Denson to an invasive series of searches or let her go. Denson argues that they should have opted for the latter choice irrespective of any adverse social consequences. Yet, such a rule would force Customs inspectors to capitulate to drug traffickers who decide to employ such depraved tactics, while simultaneously creating an incentive for drug traffickers to continue using pregnant females to internally smuggle drugs across our borders.[65] Such collateral consequences strongly militate against giving effect to such a theory.

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there is a reasonable suspicion.") However, Friedland and Lavenka's decisions were based not only on a basic profile, but also on Denson's nervous behavior, the dubious nature of Denson's answers to basic questions, and other factors—most notably, the third-party authored cover story.

65. By creating such incentives, drug traffickers will lure more pregnant women into packing their bodies with dangerous drugs. This technique is quite dangerous because the balloons or condoms, which are used as packages for the drugs, can burst or leak, causing potentially fatal drug intoxication. *See United States v. Ibekwe*, 760 F.Supp. 1546, 1558 (M.D.Fla.1991); Stephen J. Traub, *Body Packing-The Internal Concealment of Illicit Drugs*, 349 New Eng. J. Med. 2519 (2003).

In sum, based on the facts and circumstances Friedland and Lavenka encountered, we conclude that they acted reasonably and thus, did not violate the Fourth Amendment.[66] The judgment of the district court in Denson's *Bivens* case is accordingly affirmed.

III.

Because Denson failed to prove a constitutional violation in her *Bivens* case, the United States had at its disposal two defenses to her state tort law claims: (1) a jurisdictional defense provided by 28 U.S.C. § 2680(a)—the discretionary function exception; and (2) an affirmative defense under the Supremacy Clause of the Constitution. Because we find that Denson's state tort law claims are barred by the Supremacy Clause, we need not consider the applicability of the discretionary function exception and whether jurisdiction exists to entertain them.[67]

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66. In granting their motion for judgment as a matter of law on the ground that they were entitled to qualified immunity, the district court did not indicate whether Friedland and Lavenka were entitled to qualified immunity because Denson failed to prove that their conduct violated the Fourth Amendment or that their conduct, though challengeable, did not violate "clearly established" Fourth Amendment "rights of which a reasonable [Customs officer] would have known." *See Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). We conclude that they are entitled to qualified immunity because Denson failed to prove a Fourth Amendment violation.

67. In her complaint in the FTCA case, Denson asserted a claim for intentional infliction of emotional distress. We (Cont'd)

As we consider whether the Supremacy Clause bars Denson's state tort law claims, we are ever mindful that this case involves the actions of federal officers charged with safeguarding the United States border—a locus where the federal interest rises to its zenith—and the extent to which those actions may be regulated by application of state law. To be sure, the U.S. Constitution strictly allocates the responsibility for policing international borders to the federal government,[68] and officers of the United States are solely charged with carrying out that mandate.[69] While the power to control who and what enters the country is explicitly declared within the text of the Constitution itself, this power antedates the adoption of the Constitution and "is based on [the sovereign's] inherent authority to protect its territorial integrity." *Torres v. Puerto Rico*, 442 U.S. 465, 472-73, 99 S.Ct. 2425, 2430, 61 L.Ed.2d 1 (1979); *see also Ramsey*, 431 U.S. at 620, 97 S.Ct. at 1980. With this in

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summarily dismiss this claim as it is not one of the torts enumerated within § 2680(h). *See* 28 U.S.C. § 2680(h) (listing the torts of assault, battery, false imprisonment, false arrest, abuse of process, and malicious prosecution).

68. The U.S. Constitution provides that Congress shall have the power "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. Const. art. I, § 8, cl. 3.

69. *See, e.g.*, 8 U.S.C. § 1103 (charging the Secretary of Homeland Security, the Attorney General, and the Under Secretary of Homeland Security with certain responsibilities relating to border security).

mind, we must determine whether Denson can assert her state law tort claims even though Friedland and Lavenka have otherwise complied with federal law. A thorough examination of the Supreme Court's Supremacy Clause jurisprudence convinces us that the answer to this question is no.

It is a basic tenet of "Our Federalism"[70] that where federal and state law conflict, state law must yield. This principle is captured in Article VI of the Constitution, which reads: "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . , any Thing in the . . . Laws of any State to the Contrary notwithstanding." U.S. Const. art VI, cl. 2. Soon after the creation of our federal system, the Supreme Court explained that the Supremacy Clause was designed to ensure that states do not "retard, impede, burden, or in any manner control" the execution of federal law. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436, 4 L.Ed. 579 (1819); *see also Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211, 6 L.Ed. 23 (1824) (Marshall, C.J.) ("[A]cts of the State Legislatures . . . [that] interfere with, or are contrary to the laws of Congress [are to be invalidated because] [i]n every such case, the act of Congress . . . is supreme, and the law of State, though enacted in the exercise of powers not controverted, must yield to it.").

While the Supremacy Clause allows Congress to enact legislation free of any impediment or interference

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70. *See Younger v. Harris*, 401 U.S. 37, 44-45, 91 S.Ct. 746, 750-51, 27 L.Ed.2d 669 (1971).

by state law, *see Gade v. Nat'l Solid Wastes Mgmt. Assoc.*, 505 U.S. 88, 108, 112 S.Ct. 2374, 2388, 120 L.Ed.2d 73 (1992), it jointly serves to prevent state law or state law officials from interfering with or otherwise impeding federal officers as they perform their lawful duties, *see Tennessee v. Davis*, 100 U.S. 257, 263, 25 L.Ed. 648 (1880) ("No state government can exclude [the federal government] from the exercise of any authority conferred upon it by the Constitution [or] obstruct its authorized officers against its will . . . ."). The Supreme Court further explicated this maxim in *In re Neagle*, 135 U.S. 1, 10 S.Ct. 658, 34 L.Ed. 55 (1890), where California sought to prosecute a United States deputy marshal assigned to protect Justice Stephen Field during his circuit assignment after the marshal shot and killed an angry litigant. In *Neagle*, the Court held that the marshal was immune from state prosecution: "[I]f the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if, in doing that act, he did no more than what was necessary and proper for him to do, he cannot be guilty of a crime under the law of the state of California." *Id.* at 75, 10 S.Ct. at 672. The Court explained that under the Constitution, the United States "may, by means of physical force, exercised through its official agents, execute . . . the powers and functions that belong to it" free from the interference of state law.[71] *Id.* at 60-61, 10 S.Ct. at 667; *see Davis*, 100

71. The Supremacy Clause has also been invoked in cases where a state criminal defendant argues that he should have been allowed to suppress evidence obtained by a federal border (Cont'd)

U.S. at 262 (1879) (noting that the government can act only through its officers and agents, who must act within the States' territories, and allowing state law to interfere with government officers would paralyze governmental functions); *Martin v. Hunter's*, 14 U.S. (1 Wheat. 363) 304, 363, 4 L.Ed. 97 (1816) (Johnson, J., concurring) ("[T]he general government must cease to exist whenever it loses the power of protecting itself in the

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agent under the applicable state constitution. For example, in *State v. Coburn*, 165 Vt. 318, 683 A.2d 1343 (1996), a man convicted of drug possession in state court argued that his motion to suppress evidence obtained by U.S. Customs agents should have been granted because their search and seizure violated the Vermont Constitution. Citing the Supremacy Clause and Art I., § 8, cl. 3 (regulation of commerce with foreign nations), the Vermont Supreme Court held that "the Vermont Constitution does not apply to the conduct of federal government officials acting under the exclusive federal authority to safeguard the borders of the United States." *Id.* at 1347. In reaching its decision, *Coburn* cited cases from several other states that had held similarly. *See e.g.*, *People v. Mitchell*, 275 Cal.App.2d 351, 79 Cal.Rptr. 764, 767 (1969) ("A border search by a United States Customs Officer is lawful; does not depend upon probable cause; and is not governed by state laws."); *Morales v. State*, 407 So.2d 321, 329 (3d Fla. DCA 1981) (holding that evidence seized by U.S. Customs officers pursuant to reasonable border search is permissible under Florida constitution); *State v. Allard*, 313 A.2d 439, 451 (Me.1973) (finding no state constitutional violation where U.S. Customs officer turned over evidence to state police); *State v. Bradley*, 105 Wash.2d 898, 719 P.2d 546, 549 (1986) ("Neither state law nor the state constitution can control federal officers' conduct [during a border search].").

exercise of its constitutional powers. Force, . . . , or judicial process, . . . , are the only means to which governments can resort in the exercise of their authority.").

Although *Neagle* considered the question of whether the Supremacy Clause would countenance a state's criminal prosecution of a federal officer performing his duties, its teaching has broader application. It not only spares federal officers from trial in a potentially hostile state venue, *see also Willingham v. Morgan*, 395 U.S. 402, 407, 89 S.Ct. 1813, 1816, 23 L.Ed.2d 396 (1969) (noting that "federal officers, and indeed the Federal Government itself, require the protection of a federal forum"), but also imparts a framework for deciding whether the Supremacy Clause bars the application of state law to claims arising out of the conduct of federal actors. The scheme requires that courts consider whether the officer "was authorized to do [what he did] by the law of the United States," whether "it was his duty to do [it] as [an officer] of the United States," and whether "in doing that act he did no more than what was necessary and proper for him to do." *Neagle*, 135 U.S. at 57, 10 S.Ct. at 666. If the answer to these three questions is yes, conflicting state law is ineffectual.

Although setting out three distinct questions for analysis, at bottom, *Neagle* stands for the proposition that an officer of the United States cannot be held in violation of state law while simultaneously executing his duties as prescribed by federal law. An act cannot simultaneously be necessary to the execution of a duty

under the laws of the United States and an offense to the laws of a state. On the contrary, the obligations imposed by federal law are supreme, and where any supposed right or claim under state law would impede an officer from performing his duties, it must relent. *Johnson v. Maryland*, 254 U.S. 51, 56-57, 41 S.Ct. 16, 65 L.Ed. 126 (1920) (Holmes, J.) ("[E]ven the most unquestionable and most universally applicable of state laws, such as those concerning murder, will not be allowed to control the conduct of a marshal of the United States acting under and in pursuance of the laws of the United States."); *Ohio v. Thomas*, 173 U.S. 276, 283, 19 S.Ct. 453, 455, 43 L.Ed. 699 (1899) ("When discharging [their] duties under [F]ederal authority pursuant to and by virtue of valid Federal laws, [Federal officers] are not subject to arrest or other liability under the laws of the State in which their duties are performed.").

Accordingly, for purposes of the FTCA case before us, assessing whether the United States is amenable to liability under state law for the allegedly tortious conduct of Friedland and Lavenka requires reference to federal law. Conflating somewhat the elements of the *Neagle* test for simplicity's sake, we look to (1) whether the officers were acting "within the outer perimeter of [their] line of duty" as defined by federal statutory and regulatory law, *Barr v. Matteo*, 360 U.S. 564, 575, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959) (plurality opinion), and (2) whether "in doing [those acts, they] did no more than what was necessary and proper for [them] to do" as demarcated by the Constitution, *see Neagle*, 135 U.S. at 57, 10 S.Ct. at 666. As the Supreme Court explained,

"a federal official may not with impunity ignore the limitations which the controlling law has placed on his powers." *Butz v. Economou*, 438 U.S. 478, 489, 98 S.Ct. 2894, 2902, 57 L.Ed.2d 895 (1978). Indeed, it is a tautology that a federal officer's actions lie outside the scope of his authority when the officer fails to comply with the affirmative requirements of federal statutory or regulatory law, *see id.* at 489-91, 98 S.Ct. at 2902-03; *Castro v. United States*, 560 F.3d 381, 390-91 (5th Cir.2009); *United States Fid. & Guar. Co. v. United States*, 837 F.2d 116, 120 (3d Cir.1988), and his actions fail to qualify as "necessary and proper" if committed in violation of the negative injunctions of the Constitution, *see Butz*, 438 U.S. at 489-91, 98 S.Ct. at 2902-03; *Castro*, 560 F.3d at 389; *Medina*, 259 F.3d at 225; *Red Lake Band of Chippewa Indians*, 800 F.2d at 1196; *see also Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-90, 69 S.Ct. 1457, 1461, 93 L.Ed. 1628 (1949); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170-71, 2 L.Ed. 60 (1803).

To be clear, this analysis examines whether the officer's acts have some nexus with furthering federal policy and can reasonably be characterized as complying with the full range of federal law. *See Johnson*, 254 U.S. at 56-57, 41 S.Ct. at 16-17; *Scherer v. Brennan*, 379 F.2d 609, 611 (7th Cir.1967) (citing *Norton v. McShane*, 332 F.2d 855, 858-59 (5th Cir.), *cert. denied*, 380 U.S. 981, 85 S.Ct. 1345, 14 L.Ed.2d 274 (1965)). If the answer to these questions is yes, application of state law, to the extent it unavoidably conflicts with federal law, has no effect, as it would frustrate and impede the compelling federal

interest of allowing federal officers to effectively discharge their duties. *See Barr*, 360 U.S. at 571, 79 S.Ct. at 1339 ("[O]fficials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government."); *Free v. Bland*, 369 U.S. 663, 666, 82 S.Ct. 1089, 1092, 8 L.Ed.2d 180 (1962) ("The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail."); *see also Osborn v. Bank of United States*, 22 U.S. (9 Wheat. 738) 865-66, 6 L.Ed. 204 (1824).[72] If the answer is no, state

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72. In *Osborn*, Chief Justice Marshall explained:

> "An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an act of congress to imply, without expressing, this very exemption from State control .... The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples in point. It has never been doubted, that all who are employed in them, are protected, while in the line of duty; and yet this protection is not expressed in any act of Congress. It is incidental to,

(Cont'd)

law may apply with full force, as no valid federal interest arises in protecting the *ultra vires* actions of a federal officer from liability.[73]

In this particular case, the United States may not be held liable under state tort law. Friedland and Lavenka's actions bear a substantial relation to the valid and preeminent federal interests of protecting our international borders, and, while carrying out their lawfully defined duties, they complied with the full spectrum of federal statutory, regulatory, and constitutional law and did no more than was essential to carrying out their duties.

It is also of great importance to note that there exists a direct conflict between state and federal law in this

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(Cont'd)

> and is implied in, the several acts by which these institutions are created, and is secured to the individuals employed in them by the judicial power alone . . . ."

22 U.S. (9 Wheat. 738) at 865-66.

73. In *Mesa v. California*, the Supreme Court denied removal under the federal officer removal statute to two postal employees, 28 U.S.C. § 1442(a)(1), because they failed to establish that they were acting within the scope of their official duties and, therefore, had no colorable federal defense to the state law charges of reckless driving and related offenses. 489 U.S. 121, 127-28, 109 S.Ct. 959, 963-64, 103 L.Ed.2d 99 (1989). Because the federal employees' actions fell outside the scope of their federal duties, California's interest in vindicating the rights of its citizens did not frustrate any valid federal interest.

case. Initially, we note that relative to the federal government the several states have a nominal, if not *de minimis*, interest in protecting the international borders of the United States, *see e.g., State v. Coburn*, 165 Vt. 318, 683 A.2d 1343, 1347 (1996) (implying that Vermont has little interest in having its law apply to an illegal border search claim in light of the exclusive federal interest in safeguarding the international border), and, moreover, application of state tort law to the facts of this case would impede an essential federal function by subjecting the United States to suit and possible liability even though its officers did only what was necessary and proper, as defined by federal law, while effectuating federal policy. Clearly, Customs officials would be deterred from acting as is practically and unavoidably required when encountering suspected narcotics couriers if they knew that by searching and temporarily confining a suspected drug courier they would expose their employer (the United States) to a tort action for assault, battery, and false imprisonment. Such a result would have profound negative consequences, as it would frustrate the compelling federal interests identified with effective border security by discouraging bold, vigorous, and necessary action. *See Almeida-Sanchez*, 413 U.S. at 272-73, 93 S.Ct. at 2539; *Gibbons*, 22 U.S. (9 Wheat.) at 211.

As *Neagle* and its progeny teach, state law liability simply cannot attach to the acts taken by federal officers in the course of their duties and committed in compliance with federal law, where such action was "no more than what was necessary and proper for [the officer] to do"

under the circumstances, if application of state law would impede an essential federal function. *Neagle*, 135 U.S. at 57, 10 S.Ct. at 666. The Supremacy Clause will simply not countenance such a result. *See McCulloch*, 17 U.S. (4 Wheat.) at 316 (explaining that state law cannot "retard, impede, burden, or in any manner control" the necessary execution of federal law).

In sum, since Friedland and Lavenka's conduct comported with federal law, Denson's state law tort claims of assault, battery, and false imprisonment, which are in direct conflict with the federal objectives we have identified in this FTCA case, are barred. The judgment the district court entered in favor of the United States is, therefore, affirmed.

IV.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

CARNES, Circuit Judge, concurring:

I write separately to flesh out the facts and circumstances that support this Court's conclusion that the customs inspectors did not violate plaintiff Janneral Denson's constitutional rights and also to discuss why that conclusion leads to judgment for the United States on the FTCA claims.[1]

I.

Earlier this year we held in *Nguyen v. United States*, 556 F.3d 1244 (11th Cir.2009), that the United States has waived its sovereign immunity for the six tort claims listed in the proviso to 28 U.S.C. § 2680(h), when those claims arise from the actions of federal investigative or law enforcement officers. In that case the three torts were false arrest, false imprisonment, and malicious prosecution. *Id.* at 1246. The facts, as they were presented at that stage of the proceeding, *id.* at 1248 n. 1, were that a federal law enforcement officer had violated the Constitution by participating in the arrest and prosecution of the plaintiff without anything resembling probable cause, *id.* at 1248-49. Because the tort claims in the *Nguyen* case grew out of constitutional violations, we had no occasion to decide whether the § 2680(h) proviso has any application to tort claims that are not based on constitutional violations. *See Watts v.*

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1. In regard to the FTCA claims, references to "the plaintiff" or "Denson" in this opinion include Denson's son, Jordan Taylor. *See* Maj. Op. at 3092 n. 18.

BellSouth Telecomms., Inc., 316 F.3d 1203, 1207 (11th Cir.2003) ("Whatever their opinions say, judicial decisions cannot make law beyond the facts of the cases in which those decisions are announced."); *United States v. Aguillard*, 217 F.3d 1319, 1321 (11th Cir.2000) ("The holdings of a prior decision can reach only as far as the facts and circumstances presented to the Court in the case which produced that decision." (citation omitted)).

By the same token, we have no occasion in this case to decide how the FTCA might apply if the actions of the customs inspectors toward the plaintiff had been unreasonable or unconstitutional. Any implication in the majority opinion about how the FTCA might apply in those different circumstances is non-binding dicta. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 379, 114 S.Ct. 1673, 1675, 128 L.Ed.2d 391 (1994) ("It is to the holdings of our cases, rather than their dicta, that we must attend . . . ."); *Swann v. So. Health Partners, Inc.*, 388 F.3d 834, 837 (11th Cir.2004) ("[T]he prior panel rule does not extend to dicta."); *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1315 (11th Cir.1998) (Carnes, J., concurring) ("[D]icta in our opinions is not binding on anyone for any purpose.").

The plaintiff's FTCA claims, which are set out in Count XI of the second amended complaint, are based on acts of the Customs Service Director and inspectors working under his supervision that the plaintiff contends violated her rights under the Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. *See* 2nd Amend. Complaint at ¶ 145 ("The

warrantless detention, searches, handcuffing, assault, battery, and forced medication and improper treatment of the plaintiffs by Defendants . . . were undertaken without legal basis and these actions were in violation of the laws of the State of Florida, and in violation of the Fourth, Fifth, Eighth, and Fourteenth Amendments of the United States Constitution."). The majority concludes that the acts of the customs inspectors were reasonable under the circumstances and therefore did not violate the Constitution. After studying the record, I agree for reasons I will explain in Part II, infra.

After finding that the plaintiff's constitutional rights were not violated, the next question is whether her FTCA claims can survive anyway. The reason that this question arises is because the FTCA incorporates state law, specifically each state's elements of battery, false imprisonment, false arrest, and assault. *See* 28 U.S.C. § 2680(h); 28 U.S.C. § 1346(b)(1) (stating the general waiver of sovereign immunity applies "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred"); *Miles v. Naval Aviation Museum Found., Inc.*, 289 F.3d 715, 722 (11th Cir.2002) ("The FTCA creates liability for the United States only if the act at issue is a tort in the state where the conduct occurred.").

But the majority does not ask whether the plaintiff has alleged a tort other than those based on the alleged constitutional violations. It does not ask whether Florida law even allows a battery, false imprisonment, false

arrest, or assault claim against a law enforcement officer when there is no constitutional violation. Instead, the majority sidesteps those questions because of its apparent belief that it does not matter what the plaintiff pleaded or what Florida law says. According to the majority, regardless of whether the plaintiff has pleaded any claims that do not depend on constitutional violations, or whether Florida law would allow them if she had, the Supremacy Clause would bar those claims anyway. Maj. Op. at 1343-44. I do not think that is the best approach, although I agree that the plaintiff loses for two reasons.

First, as I read the plaintiff's second amended complaint, the basis for her FTCA claim is the custom inspectors' alleged violations of her Fourth, Fifth, Eighth, and Fourteenth Amendment rights. *See* 2nd Amend. Complaint at ¶ 145. By her own description of the FTCA claim, it depends on her allegation that the inspectors violated her constitutional rights. Because we determine that there was no constitutional violation, the FTCA claim fails. It is that simple.

Second, even if the plaintiff had pleaded tort claims that did not rely on constitutional violations by the federal officers, Florida law would not allow them. Florida, like other states, recognizes a defense of justification which frees law enforcement officers from liability for actions reasonably taken in pursuit of their duty to enforce the law. *See generally, e.g., City of Miami v. Sanders*, 672 So.2d 46, 47 (Fla. 3d DCA 1996) (recognizing that Florida law provides for justifiable

force by law enforcement officers, which is "a complete defense" to a battery or excessive force claim); *City of Miami v. Albro*, 120 So.2d 23, 27 (Fla. 3d DCA 1960) ("[I]n order to recover [on a false imprisonment claim] it must be shown that the restraint was unreasonable and was not warranted by the circumstances."); *id.* ("Florida has recognized . . . that to cause a person's imprisonment for the purpose of vindicating public justice is not ordinarily actionable."). Because Florida law does not impose liability on law enforcement officers who act in a reasonable and constitutional manner in carrying out their duties, as a matter of state law the customs inspectors did not commit the torts that the plaintiff attempted to use as the basis for her FTCA claim. No state torts means no FTCA claim. *See* 28 U.S.C. § 1346(b)(1). It is that simple.

The majority, however, assumes that Florida law would permit tort claims against federal law enforcement officers for the lawful discharge of their duties in a reasonable and constitutionally permissible manner. That assumption is wrong. No one has cited, nor have I been able to find, any Florida decision that supports the notion that the state law claims the plaintiff has asserted against the United States as FTCA claims could survive a finding that the customs inspectors acted reasonably and in a constitutional manner.

But on the basis of its incorrect assumption that Florida law would allow such a claim, the majority believes that it has rooted out "a direct conflict between state law and federal law." Maj. Op. at 1348. Thus, the

majority turns to the Supremacy Clause and dusts off decisions from the nineteenth century, all of which pre-date the FTCA, to establish the unstartling proposition that state law cannot be used to interfere with a federal officer's proper performance of federal law duties. *See* Majority Op. at Part III.B. That has been settled law for more than a hundred years. But all it says is that the Supremacy Clause prohibits a state from imposing liability on the United States for actions of its law enforcement officers that were taken in full compliance with federal law, including the federal Constitution.

That is obviously true, with one important caveat. The Supremacy Clause does not prevent federal law from permitting federal liability in these or any other circumstances. The sovereign is sovereign over questions of sovereign immunity. And the sovereign's will in this area of the law has been expressed in the FTCA, which incorporates state tort law *as a matter of federal law*. *See* 28 U.S.C. § 1346(b)(1); *Miles*, 289 F.3d at 722. The majority's assertion that there is a Supremacy Clause issue here relies on there being a "direct conflict" between state and federal law. *See* Maj. Op. at 1348. But under the FTCA, there can be no such conflict because the sovereign has incorporated state tort law into federal law to the extent stated in that statute. The supreme law of the land on this question is the FTCA.

Of course, the FTCA does not necessarily allow liability whenever state tort law freed of the United

States' sovereign immunity might impose it. Whether a different part of the FTCA, possibly § 2680(a) (providing that sovereign immunity is not waived for "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation"), might prohibit holding the United States liable for the constitutionally permissible actions of its officers is a question for another day. It is not a question for today because, as I have explained, Florida tort law does not impose liability in these circumstances even if the FTCA allowed it to do so and even if the plaintiff had pleaded a claim not dependent on a constitutional violation.

II.

I do agree with the majority that reasonable suspicion existed to justify the custom inspectors' actions, but I reach that conclusion for some reasons that are not included in the majority's discussion. I begin by summarizing the facts that provided the customs inspectors with reasonable suspicion to believe that plaintiff Denson was carrying drugs internally.

Denson had in her possession a highly suspicious script of what to say when questioned; she was arriving from Jamaica, a source country; she was traveling with only a carry-on bag and a purse; her trip was short (one full day and two nights); she could not provide her husband's address and phone number even though she said she had been visiting him; a third party whose name she did not know bought her ticket; the TECS system

showed an alert for her (although the primary alert had expired); she was pregnant and there is a trend of using pregnant women as internal narcotics couriers because they cannot be x-rayed, making drugs carried in their digestive tracts more difficult to detect. *See United States v. Vega-Barvo*, 729 F.2d 1341, 1350 (11th Cir.1984) ("Since swallowers [of drugs] follow a different mode of operation, customs agents' suspicions will be aroused by different factors. For example, suspicion will not focus on bulky dress . . . but on the traveler's inability to explain his or her trip." (citation omitted)). Articulable facts that were particularized to the place and person to be searched existed in this case throughout the series of increasingly invasive searches. *See id.* at 1349.

Each search ruled out the presence of drugs in a particular area or cavity of Denson's body, but the customs inspectors' reasonable suspicion that drugs were in her digestive tract was not dispelled until the monitored bowel movement search was completed. The earlier searches revealed no drugs, and each search removed any suspicion that Denson was carrying drugs in the specific area or cavity of the body where no drugs were found. *See Brent v. Ashley*, 247 F.3d 1294, 1300 (11th Cir.2001) ("[A]s a search progresses from a stop, to a pat-down search, to a strip search, an agent must reevaluate whether reasonable suspicion to justify the next level of intrusion exists in light of the information gained during the encounter."). After the initial stop (which included a pat down and luggage search), the restroom search, the pelvic exam, and the ultrasound uncovered no drugs and revealed that there were

medical risks involved in searching further, the danger went up and reasonable suspicion had to be reassessed. *See Vega-Barvo*, 729 F.2d at 1348 (stating that "as medical danger increases because of a search procedure, so must the reasons for conducting the procedure").

Nonetheless, the customs inspectors' actions-all the way through the final monitored bowel movement search in the hospital-were justified because the facts, taken as a whole, supported their reasonable suspicion that Denson was carrying drugs in her digestive tract, and that suspicion was not allayed until after the bowel movement search. *See United States v. Montoya de Hernandez*, 473 U.S. 531, 541-42, 105 S.Ct. 3304, 3311, 87 L.Ed.2d 381 (1985) (holding that customs inspectors must have "a particularized and objective basis for suspecting the particular person of alimentary canal smuggling" (quotation marks omitted)); *Vega-Barvo*, 729 F.2d at 1350 ("The standard . . . must be whether under the 'totality of the circumstances' an experienced customs inspector would reasonably believe the traveler was carrying contraband.").

Furthermore, the manner of the searches was reasonable. *See United States v. Pino*, 729 F.2d 1357, 1359-60 (11th Cir.1984) ("The manner of [an internal] search is significant in determining its reasonableness."). Denson could not be x-rayed because she was pregnant, and based on the reasonable suspicion that she was carrying drugs in her digestive tract, it was permissible for customs inspectors to detain

her at the hospital to monitor her bowel movements. *See United States v. Mosquera-Ramirez*, 729 F.2d 1352, 1357 (11th Cir.1984) ("The detention of persons at the border long enough to reveal by natural processes that which would be disclosed by a more expeditious x-ray search cannot be held to be an unreasonable seizure. Nor can the search of the results of that natural process be held to be an unreasonable search."); *United States v. De Montoya*, 729 F.2d 1369, 1371 (11th Cir.1984) ("Once Montoya refused an x-ray, her detention until natural bodily functions brought forth the fecal matter and stomach contents which the officials were entitled to search did not violate the Constitution . . . .").

Denson was at a hospital where doctors and nurses monitored her medical condition and made professional judgment calls about her high risk pregnancy. The pelvic exam, the ultrasound, and the bowel search were all conducted in that hospital setting. *Cf. Evans v. Stephens*, 407 F.3d 1272, 1281-82 (11th Cir.2005) (en banc) (concluding that the constitutional violation was obvious in a non-emergency situation where a police officer took arrestees to a broom closet or supply room and conducted body cavity searches in a degrading, forceful, and unsanitary manner). Denson was prescribed a laxative to speed up the bowel search, a procedure we have permitted where customs inspectors reasonably suspect that someone is carrying drugs internally. *See United States v. Saldarriaga-Marin*, 734 F.2d 1425, 1428 (11th Cir.1984) ("Once the Customs officers developed reasonable suspicion that Marin was an internal carrier, they could permit nature to run its course or ask Marin

to speed up the process by taking the laxative."). The use of a laxative in this case, however, is troubling because Denson's pregnancy was high risk. Even so, the hospital defendants were aware of that fact and they, not the customs inspectors, made the medical decision that the use of the laxative was appropriate.[2] It was not administered in a violent or forced manner, and if Denson ultimately had refused to take the laxative, she

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2. Denson did present some expert testimony that the medical attention she received at Jackson Memorial Hospital was below the professional standard of care in the community and that it caused the premature birth of her baby. R:204:Ex. S (affidavit of Steven Pliskow, M.D., F.A.C.O.G.). Dr. Pliskow testified that a "breach of the standard of care significantly increased the likelihood of a premature delivery of Janneral Denson by emergency caesarean." *Id.* at 6. Dr. Pliskow testified in his deposition that Nurse Reynauld, Nurse Thompson, and Dr. Amadio signed an order prescribing the laxative to Denson, R:290 at 163, which "started the whole cascade" that caused pre-term delivery of Denson's baby. *Id.* at 175. In other words, Denson's own expert testified that the hospital defendants' actions in prescribing the laxative—not the actions of the customs inspectors—caused that injury.

Denson also submitted the affidavit of Susan Wheatley, R.N. R:204:Ex. T. Wheatley testified that the nurses at Jackson Memorial "failed to advise or inform customs officers of Janneral Denson's medical condition with respect to initiation of the 'protocol used for packers,' and 'U.S. Customs Standard of Care Form.' " *Id.* at 3. Thus Denson's own expert testified that the customs inspectors were not informed about how Denson's medical condition would be affected by the standard procedures used to search people suspected of being internal drug carriers.

could have been detained at the hospital until nature took its course.[3] *See Pino*, 729 F.2d at 1360 ("In the absence of consent, the agents can detain you until nature reveals the truth or falsity of their suspicions."). The customs inspectors reasonably suspected that Denson was carrying drugs in her digestive tract, and regarding the manner of the search they reasonably relied on the judgment of medical professionals about its safety.

III.

I would affirm the district court's judgment on the FTCA claim because the customs inspectors had reasonable suspicion to conduct the searches, they acted reasonably, and there was no constitutional violation. As a result, the state law torts the plaintiff alleged did not occur. *See Miles*, 289 F.3d at 722. I would affirm the district court's judgment on the plaintiff's *Bivens* claims because no constitutional violation occurred. *See Rodriguez v. Ritchey*, 556 F.2d 1185, 1186 (5th Cir.1977).[4] I agree with the majority opinion's resolution of the issues involving the other claims.

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3. In her initial brief Denson contended that she never consented to any examinations or treatment and that she was "forced" to take the laxative. In her supplemental brief, however, she stated that she "simply gave up and drank the [laxative] in order to put an end to her ordeal."

4. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981.

APPENDIX B — FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA FILED AUGUST 9, 2005

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No.98-7256-CIV-MOORE

JANNERAL DENSON and JORDAN L. TAYLOR,
a minor, through his legal guardian,
JANNERAL DENSON

Plaintiff(s),

v.

UNITED STATES OF AMERICA, et al.,

Defendant(s).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE comes before the Court for final disposition after a four-day bench trial in Miami, Florida, from April 18, 2005, through April 21, 2005. Plaintiff filed this action against the United States of America seeking damages under the Federal Torts Claims Act ("FTCA") for circumstances surrounding her detention by United States Customs officials at the Ft. Lauderdale International Airport on February 14, 1997.

Appendix B

The Court, having heard four days of trial testimony, having reviewed the applicable pleadings, received evidence, and reviewed the applicable law, makes the following findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a).

FINDINGS OF FACT

1. Plaintiff Janneral Denson is an American citizen residing in Boyton Beach, Florida. Tr. Denson, April 21 at 129.[1]

2. On February 14, 1997, Plaintiff Janneral Denson, who was approximately six months pregnant, arrived at the Fort Lauderdale International Airport following a brief trip to Jamaica. Tr. Friedland, April 18 at 59; Pl. Trial Ex. 1; Tr. Denson, April 21 at 146-148; Tr. Denson, April 21 at 165.

3. Plaintiff traveled from Miami to Jamaica on the evening of Wednesday, February 12, 1997 and

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1. Under Florida law a child born alive, having suffered prenatal injuries at any time after conception, has a cause of action against the alleged tortfeasor. If the child is born alive, there is a relation-back to the time of injury in order for the infant person to maintain its cause of action. *Day v. Nationwide Mut. Ins. Co.*, 328 So. 2d 560, 562 (Fla. Dist. Ct. App. 1976). In essence, Plaintiff Jordan Taylor's claims of assault and battery, false imprisonment/arrest, intentional infliction of emotional distress and invasion of privacy, are derivative of United States Customs officials' treatment of Janneral Denson. This Court, therefore, focuses on the treatment of Plaintiff Janneral Denson.

returned on an unscheduled Air Jamaica flight to the Fort Lauderdale airport on the afternoon of Friday, February 14, 1997. Tr. Friedland, April 18 at 59-61; Pl. Trial Ex. 1; Tr. Denson, April 21 at 146-148.

4. The total length of Plaintiff's trip was approximately one full day. Tr. Friedland, April 19 at 96; Pl. Trial Ex. 1.

5. Jamaica is known to Custom's inspectors as a source country for smuggling narcotics into the United States. Tr. Friedland, April 18 at 62; Tr. Smith, April 20 at 102, 129; Tr. Fortin, April 21 at 16; Tr. Cappuccio, April 21 at 32-33.

6. South Florida is considered an entry point into the United States for narcotics from source countries. Tr. Fortin, April 21, at 16.

7. When there is a flight arriving from a source country, United States Customs inspectors are on high alert. Tr. Flynn, April 19 at 145; Tr. Fortin, April 21 at 14-20; Tr. Friedland, April 19 at 88, 96, 106; Tr. Cappuccio, April 21 at 32.

8. Plaintiff entered the United States with no luggage and carried only a purse and a small to medium sized bag. Tr. Denson, April 21 at 141, 142, 148.

9. Plaintiff passed through the primary customs inspection without incident. Tr. Denson, April 21 at 148-149.

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10. Subsequently, Senior Inspector Friedland ("SI Frieldand"), who was posted at a secondary Customs station, observed Plaintiff quickly exiting the Customs area and avoiding eye contact. Tr. Friedland, April 18 at 71; Tr. Friedland, April 19 at 88-89.

11. SI Friedland further noted that Plaintiff was pregnant and was traveling with no luggage. *Id.*

12. United States Customs inspectors were aware of a smuggling trend in which pregnant women were recruited as drug couriers because they were less likely to be detected by United States Customs as drug couriers. Tr. Friedland, April 19 at 106-107; Tr. Lavenka, April 20 at 71; Tr. Cappuccio, April 21 at 37; Tr. Smith, April 20 at 132-133; Tr. Fortin, April 21 at 19-20.

13. Furthermore, Customs is unable to x-ray a pregnant women to determine if they are internal narcotics couriers. *Id.*

14. SI Friedland called out to Plaintiff, but Plaintiff did not halt. Tr. Friedland, April 18 at 71; Tr. Friedland, April 19 at 90.

15. SI Friedland quickly moved toward Plaintiff. Tr. Friedland, April 19 at 90.

Appendix B

SECONDARY BELT

16. When SI Friedland caught up with Plaintiff, she escorted Plaintiff to the secondary belt for questioning. Tr. Friedland, April 19 at 60, 91.[2]

17. SI Friedland began asking Plaintiff routine Customs questions which Plaintiff had difficulty answering. Tr. Friedland, April 18 at 71.

18. When asked about the purpose of her trip, Plaintiff stated that she went to see her husband, Richard Scott, in Jamaica. Tr. Friedland, April 19 at 94; Tr. Denson, April 21 at 152.

19. At trial Plaintiff further explained that she went to see her husband because they had an appointment with Jamaican immigration officials to obtain a visa for him to come to the United States. Tr. Denson, April 21 at 152.

20. SI Friedland testified that she could not recall if Plaintiff had told her that she was having a meeting with Jamaican authorities to obtain a visa for Richard Scott. Tr. Friedland, April 19 at 39.

21. Plaintiff initially could not tell SI Friedland where Plaintiff's husband lived. Tr. Friedland, April 18 at 77; Tr. Friedland, April 19 at 94.

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2. At some point during this phase of the investigation, Plaintiff was escorted into the search room. It is unclear to this Court exactly when that change in location occurred.

22. Plaintiff later stated that her husband lived in a parish in Jamaica. Tr. Friedland, April 19 at 95.

23. SI Friedland asked Plaintiff how she contacted her husband. Tr. Friedland, April 18 at 77; Tr. Friedland, April 19 at 95.

24. Plaintiff replied that she contacted her husband by telephone, but she could not give SI Friedland her husband's telephone number. *Id.*

25. Plaintiff had in her possession a "marriage register" of the marriage between Plaintiff and Richard Scott. Tr. Friedland, April 19 at 52.

26. SI Friedland asked Plaintiff how she got her airplane ticket to Jamaica and who paid for her ticket. Tr. Friedland, April 19 at 95; Tr. Denson, April 21 at 152.

27. After some hesitation, Plaintiff told SI Friedland that a man named Osmond purchased the airplane ticket to Jamaica. Tr. Friedland, April 19 at 95

28. However, Plaintiff did not know "Osmond's" last name. *Id.*

29. Plaintiff further stated that she reimbursed Osmond for the ticket with money from her income tax refund and allegedly showed SI Friedland an H&R Block check stub. Tr. Denson, April 21 at 153.

30. SI Friedland noted that Plaintiff's ticket was purchased only four (4) days prior to her trip. Tr. Friedland, April 19 at 95.

31. When SI Friedland questioned Plaintiff about her employment, Plaintiff stated that she worked for Office Depot. Tr. Friedland, April 19 at 98; Tr. Denson, April 21 at 153.

32. SI Friedland requested the telephone number of Plaintiff's employer. Tr. Friedland, April 18 at 78; Tr. Friedland, April 19 at 98.

33. When SI Friedland attempted to confirm Plaintiff's employment by calling the number provided by Plaintiff, SI Friedland found that the number had been disconnected. Tr. Friedland, April 18 at 78; Tr. Friedland, April 19 at 98.

34. SI Friedland asked Plaintiff how much money she was carrying. Tr. Friedland, April 19 at 98.

35. Plaintiff had in her possession two $100 dollar bills and various other bills. Tr. Friedland, April 19 at 98.

36. Plaintiff traveled with an affidavit of citizenship, rather than a passport or other form of travel identification. Pl. Trial. Ex. 42MM; Tr. Denson, April 21 at 145-146.

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37. Plaintiff was carrying a tablet of paper that contained the following handwritten information about her husband:

RICHARD SCOTT - POULTRY FARMER SINCE 1994

LIVES @ Belfast NEAR MORANT BAY IN THE PARISH OF SAINT THOMAS.

HIS BIRTHDAY IS: FEB. 17Th (BORN 1972)

How you met.

DEC. 1995 A FRIEND INVITED YOU TO JAMAICA WHILE THERE WENT TO THE BEACH DUNNS RIVER MET HIM THERE.

DEC. 1996 HE VISITED YOU AT YOUR FRIENDS SAINT ANN HOME YOU INVITED HIM AT HIS SAINT THOMAS HOME *YOU HAD NO PRIOR KNOWLEDGE OF HIM YOU RETURNED HOME TO FLORIDA – TELEPHONE EXCHANGE

* *ALWAYS USED CALLING CARDS* – PRICE REASONS

MARCH 1996 YOU WENT DOWN TO VISIT HIM IN JAMAICA.

OCT. 1996 YOU WENT BACK TO MARRY HIM

* HIS PHONE WRITTEN DOWN at HOME 809 Something You are not good with remembering Numbers.

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*NOT HIS PHONE ANYWAY Neighbors' Phone.

ANY OTHER Questions Just answer something in that case try to remember what you were asked and what you answered.

* DOES HE HAVE RELATIVE OR FRIENDS IN U.S. THAT YOU KNOW OR KNOW OF—NO—

Pl. Trial Ex. 42BB.

38. Initially Plaintiff told SI Friedland that she did not know who wrote the document. Tr. Friedland, April 19 at 37.

39. Plaintiff later told SI Friedland that she wrote the information on the tablet but that she had seven different handwritings. Tr. Friedland, April 18 at 97; Tr. Friedland, April 19 at 36-37.

40. At trial Plaintiff admitted that in fact she did not write the script, but that it was written for her by Osmond. Tr. Denson, April 21 at 137.

41. As part of the inspection process, SI Friedland queried the Treasury Enforcement Communication System ("TECS II") computer data base for any information concerning Plaintiff.[3] Tr. Friedland, April 19 at 101-102.

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3. TECS is a computerized system that reveals persons who are entering the country who are on terrorist alert, (Cont'd)

42. The TECS lookout stated:

> REFER TO CUSTOMS FOR ENFORCEMENT EXAM. ACQUIRED TRAVEL DOCUMENTS SHORTLY BEFORE DEPARTURE. MATCHES HI RISK NARCO-TARGETING INDICATORS. (IF ARRIVING FROM SOURCE COUNTRY).

Pl. Trial Ex. 42-CC.

43. After further questioning by SI Friedland, Plaintiff stated that she was with a friend in Jamaica, but Plaintiff could not provide SI Friedland with this friend's last name. Tr. Friedland, April 19 at 106.

44. In addition, Plaintiff stated that she traveled to Jamaica with her friend Shelita Jacobs (phonetic). There is some confusion, however, as to when Plaintiff traveled with Ms. Jacobs, whether it was at this time or during a previous trip to Jamaica. Tr. Friedland, April 18 at 79, 118; Tr. Friedland, April 19 at 106.

45. However, it appears from the credible evidence that SI Friedland believed that Plaintiff represented to her that Ms. Jacobs was traveling with Plaintiff on this trip. Tr. Friedland, April 18 at 79, 118.

(Cont'd)

outstanding warrants, probation violators, persons suspected of narcotics trafficking, money laundering and violations of other laws. Tr. Friedland, April 19 at 102; Tr. Flynn, April 19 at 148.

46. When SI Friedland was unable confirm that in fact Ms. Jacobs had been traveling with Plaintiff, SI Friedland believed that Plaintiff had made a false statement. Tr. Friedland, April 19 at 106.

47. During the period of questioning at the secondary belt, Plaintiff exhibited signs of nervousness. Plaintiff held tightly to the examination belt to avoid shaking, avoided eye contact, and was breathing heavily. Tr. Friedland, April 18 at 75; Tr. Friedland, April 19 at 93, 97, 141-142.

48. At this point, on the basis of her experience, SI Friedland concluded that Plaintiff was carrying narcotics internally.

RESTROOM SEARCH

49. Approximately fifteen (15) minutes after SI Friedland completed her questioning of Plaintiff, Plaintiff indicated that she needed to use the restroom. Tr. Friedland, April 19 at 110; Tr. Denson, April 21 at 156.

50. SI Friedland conducted a pat down of Plaintiff prior to her using the restroom. Tr. Denson, April 21 at 157.[4]

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4. At some point SI Friedland requested and received permission from Supervisor Flynn to perform the pat down of Plaintiff Tr. Friedland, April 18 at 57.

51. SI Friedland testified that she formed the pat down "within the standard operating procedure that [she had] been trained and consistent with the way you are supposed to do it." Tr. Friedland, April 19 at 110. This fact was not controverted at trial. This court thus assumes that this was a routine Terry-like pat down.

52. The door was left open as Plaintiff used the restroom. Tr. Denson, April 21 at 157.

53. After Plaintiff used the restroom, consistent with Customs procedures, SI Friedland inspected the toilet paper, the contents of the toilet, and Plaintiff's undergarments. Tr. Friedland, April 18 at. 57-58; Tr. Friedland, April 19 at 110-111; Tr. Banks, April 21 at 88, 96; Tr. Denson, April 21 at 157-159.

54. Upon returning from the restroom Plaintiff was placed in handcuffs and her property was inventoried. Tr. Denson, April 21 at 160.

55. SI Friedland then read Plaintiff her rights and asked Plaintiff to sign a waiver which Plaintiff refused to do. Tr. Friedland, April 18 at 80; Tr. Denson, April 21 at 161-162; Pl. Trial Ex. 42AA.

Appendix B

TRANSPORT TO JACKSON MEMORIAL HOSPITAL ("JMH")

56. SI Friedland next sought and received supervisory approval from Acting Port Director Levanka to transport Plaintiff to Jackson Memorial Hospital as a suspected internal narcotics courier. Tr. Friedland, April 19 at 36, 58-60.[5]

57. Approval for examination at Jackson Memorial Hospital was based on the totality of the facts and circumstances gathered by SI Friedland. Tr. Lavenka, April 19 at 192, 204, 206-8; Tr. Levanka, April 20 at 50.

58. Plaintiff was then transported to Jackson Memorial Hospital for examination and treatment.[6] Tr. Friedland, April 19 at 112; Tr. Fortin, April 21 at 12, 14.

59. Upon arriving at Jackson Memorial Hospital Plaintiff was photographed and told to go into a room and change from her clothes into hospital clothes. Tr. Denson, April 21 at 163-164.

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5. Lee Lavenka was appointed by the Port Director to be the Acting Port Director from February 14 through February 16. Tr. Lavenka, April 19 at 190. He had been a supervisory customs inspector since 1991. Tr. Lavenka, April 20 at 76.

6. Customs and Jackson Memorial Hospital have an arrangement whereby the Hospital provides medical services to patients suspected of smuggling contraband inside the body. Tr. Friedland, April 19 at 28.

60. Plaintiff was then taken to the Labor and Delivery section of the Hospital. Tr. Denson, April 21 at 165-166.

61. Upon arriving at Labor and Delivery, Plaintiff was asked her name and date of birth by a Jackson Memorial Hospital employee and was asked to sign an unidentified form. *Id.*

62. Plaintiff refused to sign this form stating that she was not going to be responsible to pay any bill resulting from her stay. *Id.*

63. Plaintiff was next taken into a small waiting room and asked to give a urine sample to verify her pregnancy. Tr. Denson, April 21 at 165-166.

64. Plaintiff was then placed in a bed which was separated by curtains from other beds.Tr. Denson, April 21 at 166-167.

65. Plaintiff's left hand was handcuffed to the bed. *Id.*

66. In the presence of SI Friedland, Plaintiff was examined by a physician specializing in obstetrics. Tr. Friedland, April 19 at 31; Tr. Denson, April 21 at 170.

67. The physician performed a pelvic examination and an obstetrical ultrasound examination. Tr. Denson, April 21 at 167-168.

68. The pelvic examination was negative for drugs. Tr. Denson, April 21 at 170-171; Tr. Friedland, April 19 at 32.

69. The obstetrical physical examination and ultrasound, however, did not rule out the possibility that Plaintiff was smuggling drugs in her digestive system. Tr. Levanka, April 19 at 234.

70. Because an x-ray exam during pregnancy is not permitted, Plaintiff was held for a monitored bowel movement. Tr. Friedland, April 19 at 63, 64, 118; Tr. Lavenka, April 20 at 74, 196.

71. This process requires three separate drug-free stool samples in accordance with the standard established by the Jackson Memorial Hospital doctors and United States Customs. Tr. Friedland, April 19 at 27; Tr. Lavenka, April 19 at 196; Tr. Levanka, April 20 at 59.

72. Plaintiff was taken back to Ward D for the monitored bowel movement. Tr. Denson, April 21 at 171.

73. In Ward D Plaintiff was place in a bed and one hand was handcuffed to the bed rail. Tr. Denson, April 21 at 171.

74. Plaintiff was prescribed and provided the laxative Go-Lytely by the hospital staff. Tr. Friedland, April 19 at 26, 29-30, 120.

75. Plaintiff testified that SI Friedland told her that she had to drink the Go-Lytely and pass three clear stools or she was not going to be able to leave. Tr. Denson, April 21 at 175.

76. Plaintiff drank the Go-Lytely and had three bowel movements containing no packets of drugs. Pl. Trial Ex. 42 HH.

77. The last drug free stool was passed on February 16, 1997 at 9:45 a.m. Pl. Trial Ex. 42 HH.

78. Following the negative bowel movements, Plaintiff was informed that she was to be released, her handcuffs were removed and she was allowed to dress. Tr. Denson, April 21, at 181.

79. Plaintiff was discharged on February 16, 1997 after no drugs were found in her digestive system. Tr. Lavenka, April 19 at 202; Tr. Friedland, April 19 at 27.

80. Plaintiff was driven back to the Ft. Lauderdale airport, where Customs retrieved her property that had been held in a safe, and Plaintiff was allowed to continue on her travel. Tr. Friedland, April 19 at 117, 122; Tr. Denson, April 21 at 182-184.

Appendix B

CONCLUSIONS OF LAW

FEDERAL TORT CLAIMS ACT

1. This Court has jurisdiction over the parties and the subject matter. 28 U.S.C. § 1346.

2. In this civil action, Plaintiffs' burden of proof is a preponderance of the evidence. *Sandoval v. Hagan*, 7 F. Supp. 2d 1234, 1245 (M.D. Ala. 1998).

3. "A preponderance of the evidence means such evidence, when considered with that opposed to it, has more convincing force, and demonstrates that what is sought to be proved 'is more likely true than not true.' " *Id.* (citing Eleventh Circuit Pattern Jury Instructions).

4. Compared to the summary judgment stage where the court is legally required to view the evidence in the light most favorable to Plaintiffs, and all reasonable inferences to be dawn therefrom, the Court is now required to weigh all the evidence.

5. Plaintiffs' claims arise under the FTCA, 28 U.S.C. §§ 1346(b), 2671-2680.

6. The FTCA provides that the "United States may be liable for the conduct of its employees 'in the same manner and to the same extent as a private individual under like circumstances.' " *Pate v. Oakwood Mobile Homes*, 374 F.3d 1081, 1083 (11th Cir. 2004).

7. Congress's chief intent in drafting the FTCA was not "to create new causes of action" but "simply to provide redress for ordinary torts recognized by state law." *Howell v. United States*, 932 F.2d 915, 917 (11th Cir. 1991).

8. It was not "intended as a means to enforce federal statutory duties." *Id.* Indeed, "even where specific behavior of federal employees is required by statute, liability to the beneficiaries of that statute may not be founded on the Federal Tort Claims Act if state law recognizes no comparable private liability." *Sellfors v. United States*, 697 F.2d 1362, 1367 (11th Cir. 1983).

9. As a result, in analyzing Plaintiffs' claims, the Court must look to the law of the jurisdiction in which the wrongs are alleged to have occurred, which undisputedly is the state of Florida.

10. Plaintiff has sued the United States of America in Count Eleven (11) of the Second Amended Complaint, under the Federal Tort Claims Act (FTCA), alleging that a warrantless detention, search, handcuffing, assault, battery and forced medication violated tort law. These claims can be appropriately recast as the torts of assault and battery, false arrest/imprisonment, intentional infliction of emotion distress, and invasion of privacy.

Appendix B

ASSAULT AND BATTERY

11. A battery consists of the infliction of a harmful or offensive contact upon another with the intent to cause such contact or the apprehension that such contact is imminent. *Sullivan v. Atlantic Fed. Sav. & Loan Ass'n*, 454 So.2d 52, 54 (Fla. Dist. Ct. App. 1984), *review denied*, 461 So.2d 116 (Fla. 1985); *Chorak v. Naughton*, 409 So.2d 35, 39 (Fla. Dist. Ct. App. 1981).

12. "An 'assault' is an intentional, unlawful offer of corporal injury to another by force, or exertion of force directed toward another under such circumstances as to create a reasonable fear of imminent peril." *Sullivan*, 454 So. 2d at 54.

13. Public law enforcement officers acting within the scope of their employment are privileged to use reasonable force to arrest or apprehend criminal suspects. Excessive, unnecessary, or malicious force is not privileged. *O'Brien v. Food Fair Stores, North Dade, Inc.*, 155 So. 2d 836 (Fla. Dist. Ct. App. 1963); *City of Miami v. Nelson*, 186 So. 2d 535 (Fla. Dist. Ct. App. 1966); *Hutchinson v. Lott*, 110 So. 2d 442 (Fla. Dist. Ct. App. 1959); Fla. Stat. § 776.05.

14. "Whether the force used is reasonable is a question of fact to be determined in light of the circumstances of each particular case. In any case the officer can never use more force than reasonably appears to be necessary, or subject the

person arrested to unnecessary risk of harm." *Miami v. Albro*, 120 So. 2d 23, 26 (Fla. Dist. Ct. App. 1960).

FALSE IMPRISONMENT OR ARREST[7]

15. The tort of false imprisonment or false arrest is defined as "the unlawful restraint of a person against his will, the gist of which action is the unlawful detention of the plaintiff and the deprivation of his liberty." *Johnson v. Weiner*, 19 So. 2d 699, 700 (Fla. 1944); *Harris v. Lewis State Bank*, 436 So. 2d 338 (Fla. Dist. Ct. App. 1983).

16. The plaintiff need not show that force was used in the detention, nor that she made an oral protest to demonstrate that the detention was against her will. A plaintiff alleging false imprisonment must show, however, that the restraint was "unreasonable and unwarranted under the circumstances." *Harris v. Lewis State Bank*, 436 So. 2d 338, 341 (Fla. Dist. Ct. App. 1983) (internal citations omitted).

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

17. To establish a claim for intentional infliction of emotional distress under Florida law, a plaintiff

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7. "It is well established that border searches are not subject to constitutional probable cause and warrant requirements." *United States v. McMurray*, 747 F.2d 1417, 1419-20 (11th Cir. 1984).

must show: "(1) extreme and outrageous conduct; (2) an intent to cause, or reckless disregard to the probability of causing, emotional distress; (3) severe emotional distress suffered by the plaintiff; and (4) proof that the conduct caused the severe emotional distress." *Gonzalez-Jimenez de Ruiz v. United States,* 231 F. Supp. 2d 1187, 1199 (M.D. Fl. 2002).

18. Outrageous conduct has been defined as "outrageous in character, and so extreme in degree, as to go beyond all bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized community." *Metropolitan Life Ins. Co. v. McCarson,* 467 So.2d 277, 278-79 (Fla. 1985).

19. "The conduct, although it would otherwise be extreme and outrageous, may be privileged under the circumstances." *Id.* at 279.

20. "Conduct is intentional where the actor knows that severe distress is certain, or substantially certain to result from his conduct." *Hart v. United States,* 894 F.2d 1539, 1548 (11th Cir. 1990).

UNLAWFUL INVASION OF PRIVACY

21. Plaintiff alleges an invasion of Plaintiff's right to privacy as defined by *Agency for Healthcare Administration v. Associated Industries of Florida, Inc.,* 678 So. 2d 1239 (Fla. 1996). In that case the court explained that:

> The four types of wrongful conduct that can all be remedied with resort to an invasion of privacy action are: (1) appropriation—the unauthorized use of a person's name or likeness to obtain some benefit; (2) intrusion—physically or electronically intruding into one's private quarters; (3) public disclosure of private facts—the dissemination of truthful private information which a reasonable person would find objectionable; and (4) false light in the public eye—publication of facts which place a person in a false light even though the facts themselves may not be defamatory.
>
> *Id.* at 1252 n. 20 (citing *Forsberg v. Housing Auth. of Miami Beach*, 455 So. 2d 373, 376 (Fla. 1984)).

22. It appears that Plaintiff is relying on the second element of invasion of privacy — intrusion—as the legal basis for her invasion of privacy claim. That element, however, makes actionable unwelcome entry into "one's private quarters."

23. As the Florida Supreme Court clarified in *Allstate Ins. Co. v. Ginsberg*, 863 So. 2d 156 (Fla. 2003), "[t]he intrusion to which this refers is into a "place" in which there is a reasonable expectation of privacy and is not referring to a body part. The tort of invasion of privacy was not intended to be duplicative of some other tort." *Id.* at 162.

24. Plaintiff's claim for invasion of privacy under Florida state law must therefore fail as a matter of law.

Appendix B

BORDER SEARCHES

25. In looking at whether Defendant, the United States of America, committed each of the remaining torts — assault and battery, false imprisonment/ arrest and intentional infliction of emotional distress — this Court must consider the reasonable suspicion of the Customs officers.

26. In the context of border searches, the law that is binding upon this Court is very well settled. Customs and Immigration checkpoints in our Nation's airports are the functional equivalent of national borders, and as such, United States Customs officials can conduct routine searches upon all individuals as a matter of constitutional right. *See Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973); *United States v. Hewitt*, 724 F.2d 117 (11th Cir. 1984).

27. Routine border searches, which include searches of luggage and Terry-style pat down searches, are presumed to be reasonable. *United States v. Ramsey*, 431 U.S. 606, 616 (1977); *United States v. Vega-Barvo*, 729 F.2d 1341, 1344 (11th Cir. 1984) (holding that "[n]o articulable suspicion is required for routine border searches which only intrude slightly on a person's privacy. Both a luggage search and a pat-down or frisk fall within this category and these searches can legitimately be carried out on no more than a generalized "mere suspicion" or "subjective response" of the customs inspector")

(internal citations omitted); *Brent v. Ashley*, 257 F.3d 1294 (11th Cir. 2001) (holding that no level of suspicion is necessary for the stop of an entrant, for questioning of the individual, for examination of the entrant's possessions, or for a pat-down of the outer garments).

28. The Supreme Court explained the reasoning behind this policy in *Montoya De Hernandez:*

> Since the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country.
>
> *United States v. Montoya De Hernandez*, 473 U.S. 531, 537 (1985).

THE INITIAL STOP AND PAT DOWN

29. An initial stop, search of luggage and pat down search, are presumed to be reasonable at the border. *United States v. Ramsey*, 431 U.S. 606, 616 (1977); *United States v. Vega-Barvo*, 729 F.2d 1341, 1344-5 (11th Cir. 1984).

30. Here, the record reveals that Plaintiff was subjected to a pat down behind closed doors. The

uncontroverted evidence demonstrates that during this pat down, the Customs official manually inspected Plaintiff's entire body above her clothing.

31. This portion of Plaintiff's experience did not exceed the threshold of routine Customs procedure and as such, was well within the bounds of the law. This Court finds that the stopping of Plaintiff, the search of her luggage and the pat down were per se reasonable.

THE RESTROOM SEARCH AND TRANSPORT TO JACKSON MEMORIAL HOSPITAL

32. The Supreme Court in *Montoya* noted that internal smuggling of drugs gives an inspector no external clues that this is the method of concealment. The Court held that "the detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents, considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband in her alimentary canal." *Montoya*, 473 U.S. at 541.

33. Searches that are not routine must be based on reasonable suspicion. The reasonable suspicion standard requires a showing of articulable facts which are particularized as to the person and as to the place that is to be searched. *Vega-Barvo*, 729 F.2d 1341 (11th Cir. 1984).

34. "Once reasonable suspicion exists to detain a traveler, the detention can continue "for the period of time necessary to either verify or dispel the suspicion." *Montoya*, 473 U.S. at 544.

35. The Court is mindful that the conduct of a traveler might be innocently explained, but to an experienced inspector may be suspicious. *United States v. Arvizu*, 534 U.S. 266 (2002) (a unanimous Court concluded that odd conduct when entering the country cannot be discounted, merely because an innocent explanation can be offered for the conduct); *Vega-Barvo*, 729 F.2d at 1350 ("Many of the factors supporting reasonable suspicion will seem innocent enough if evaluated independently and without the expertise of an experienced customs inspector").

36. The Supreme Court has cautioned against indulging in "unrealistic second guessing," and that those "engaged in post-hoc evaluations of [police] conduct can almost always imagine some alternative means by which the objectives of the [police] might have been accomplished." *United States v. Sharp*, 470 U.S. 675, 686 (1985).

37. In this instance, Plaintiff, in the midst of an enforcement exam, requested to use the restroom. SI Friedland, accompanied by Inspector Banks, escorted Plaintiff to the restroom.

38. The door was left open as Plaintiff used the restroom. Tr. Denson, April 21 at 157.

39. After Plaintiff used the restroom, SI Friedland inspected the toilet paper, the contents of the toilet, and Plaintiff's undergarments. Tr. Friedland, April 18, p. 57-58, April 19, p. 110-111; Tr. Banks, April 21 at 88, 96; Tr. Denson, April 21 at 157-159.

40. SI Friedland's primary purpose in conducting this inspection was ensuring that Plaintiff was not disposing of narcotics or destroying evidence. This inspection was ancillary to Plaintiff's request to urinate.

41. SI Friedland testified that she went into the bathroom with Plaintiff because it was Customs policy that two female officers must accompany a female that requests to use the bathroom during an enforcement exam. Tr. Friedland, April 18 at 57.

42. Further, she testified that, as was required by Customs, she watched Plaintiff urinate, looked at her undergarments, panty liner, toilet bowl and used tissue. Id. at 57-58; Tr. Friedland, April 19 at 110-111.

43. SI Friedland testified that it was not her intent to take Plaintiff to the ladies room or to search Plaintiff absent Plaintiff's request to use the restroom. Friedland, April 19 at 110.

44. Customs officers were aware that internal narcotics couriers frequently try to dispose of narcotics in the restroom. Tr. Friedland, April 19 at 111.

45. Moreover, the credible evidence presented in this case demonstrates that the Customs officers did not search Plaintiff's body in a manner consistent with a typical strip search. Rather the Customs officers' restroom examination of Plaintiff was limited to inspecting the above mentioned items.

46. Second, this Court notes that the intrusiveness of this non-routine border search was minimal. The intrusiveness of a search is measured by the indignity suffered by the person searched. *Vega-Barvo*, 729 F.2d at 1345.

47. In *United States v. Vega-Barvo*, 729 F.2d 1341, 1344 (11th Cir. 1984) the court held that as the intrusiveness of the search increases, the amount of suspicion necessary to justify the search correspondingly increases. *Id.* Thus, the personal indignity suffered by the individual searched controls the level of suspicion required to make the search reasonable. *Id.* at 1346.

48. The Court in *Vega-Barvo* isolated three factors that contribute to the indignity of the person searched: (1) personal contact between the searcher and the person searched; (2) exposure of intimate body parts; and (3) use of force. *Id.* at 1346.

49. There was simply no testimony at trial of any physical contact between Plaintiff and SI Friedland during the restroom search. Moreover, any exposure of intimate body parts was minimal. Furthermore, there was no threat of force or use of force.

50. As such, upon close examination of the credible evidence and testimony presented at trial and applying the *Vega-Barvo* factors to assess the indignity suffered by Plaintiff during the restroom encounter, the Court determines that the intrusiveness of this search and the indignity suffered by Plaintiff was minimal.

51. The Customs officers had overwhelming reasonable suspicion to suspect that Plaintiff was an internal narcotics courier and a credible basis for believing that she was requesting to use the restroom to dispose of narcotics.

52. Upon reasonable suspicion, persons suspected of being "internal drug couriers," "swallowers" or "mules" may be detained and taken to a hospital for either an x-ray or confined for excretion of the stomach contents. *United States v. De Montoya*, 729 F.2d 1369, 1371 (11th Cir. 1984); *United States v. Padilla*, 729 F.2d 1367 (11th Cir. 1984).

53. "Once a particularized suspicion arises that you are an internal carrier, the agents can conduct a search sufficient to determine the accuracy of that

suspicion, the type of search depending in part on what you consent to. In the absence of consent, the agents can detain you until nature reveals the truth or falsity of their suspicions." *United States v. Pino*, 729 F.2d at 1360.

54. "Once the Customs officers developed reasonable suspicion that [Plaintiff] was an internal carrier, they could permit nature to run its course or ask [Plaintiff] to speed up the process by taking the laxative." *United States v. Saldarriaga-Marin*, 734 F.2d 1425 (11th Cir. 1984).[8]

55. In *Vega-Barvo* the court adopted a "flexible test which adjusts the strength of suspicion required for a particular search to the intrusiveness of that search." 729 F.2d at 1344.

56. In this case SI Friedland was presented a plethora of extremely unusual and troubling facts that combined to form her reasonable suspicion that Plaintiff was an internal narcotics courier.

57. Plaintiff was a pregnant female who arrived in Ft. Lauderdale from Jamaica, a source country, after an extremely brief stay. Customs inspectors are

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8. This Court notes that handcuffing someone who is a suspected internal narcotics carrier is reasonable. *United States v. Henao-Castano*, 729 F.2d 1364,1366 (11th Cir. 1984) (finding that "[s]hackling [Plaintiff] to a wheelchair was a reasonable method of preventing him from attempting to dispose of the contents of his stomach before they could be searched").

aware that short trips are common by smugglers, because the cost of the trip is minimized and the payoff increased. Tr. Friedland, April 18 at 61; Tr. Friedland, April 19 at 96-97.

58. Plaintiff was traveling with no luggage and carried only a purse and handbag. Inspectors were aware that lack of luggage is common for internal narcotics carriers because it minimizes the amount of time that they must remain in the Customs area. Tr. Friedland, April 18 at 70; Tr. Levanka, April 19 at 229.

59. Plaintiff could not provide any specifics about the person who, only four days prior to travel, had purchased Plaintiff's airplane ticket. Inspectors testified that a "third-party booking" of a ticket is significant in the context of internal narcotics couriers, particularly when the passenger does not know the name of the purchaser. Third-party booking is a method that smugglers use to avoid revealing the identity of one or more of the smugglers. Tr. Friedland, April 18 at 69; Tr. Friedland, April 19 at 96; Tr. Smith, April 20 at 143; Tr. Fortin, April 21 at 19.

60. Plaintiff had taken multiple short trips to Jamaica in 1996. Tr. Denson, April 21 at 189.

61. Plaintiff stated that she went to Jamaica to visit her husband but she was unable to provide an address or telephone number for her husband. *Supra* at ¶¶ 15-18.

62. Plaintiff could not present verifiable employment information. Lack of verifiable employment is a factor that inspectors consider in assessing the possibility of narcotics smuggling. Tr. Friedland, April 18 at 78, April 19 at 98. Furthermore, the phone number for her employer that Plaintiff provided to SI Friedland was out of service. *Supra* at ¶¶ 23-25.

63. To further heighten the Customs officers' suspicion, Plaintiff was flagged as a potential drug courier in the TECS II computer system. Tr. Friedland, April 18 at 125-6, April 19 at 45, 101-102. A TECS II entry is significant to inspectors in assessing whether the person entering the United States is importing illegal drugs. Tr. Smith, April 20 at 131.

64. At trial there was extensive testimony regarding the significance of the "start and stop date" indicated on the TECS query. The TECS II query contained the following information: "START 110196" and "STOP 013097." Various parties testified as to the existence of both a thirty (30) day "lookout" and one (1) year "lookout" that can be inputted into the TECS system.

65. This Court first notes that the "lookout" at issue here is in fact a 90 day lookout. This Court further notes that the ninety (90) day lookout, which would have triggered an immediate referral by primary customs to secondary customs between the dates

of 11/01/96 and 1/30/96, expired as a primary lookout only two (2) weeks before the incident at issue in this case.

66. Plaintiff's counsel made much of the fact that since the primary lookout dates had expired, SI Freidland had to query the TECS II system in order to obtain this TECS II report. This Court rejects any inference that a Customs inspector's query of the TECS II system at the secondary belt amounts to any sort of extraordinary investigatory measure. Tr. Friedland, April 18 at 126.

67. All that is necessary to pull up this information is the passenger's name and date of birth. Tr. Friedland April 19 at 103.

68. Furthermore, this Court notes that the credible evidence demonstrates that while the primary lookout trigger date expired on 1/30/97, the TECS II report would remain in the system for any inspector to consult for at least one year. Tr. Friedland, April 18 at 94.

69. After the year expired a notification would be sent to the creator of the report notifying the creator of the impending expiration of the report and the creator could then choose whether to let the report expire or allow it to remain in the system. Tr. Smith, April 20 at 138.

70. In addition to all of these suspicious circumstances, there was the extraordinarily peculiar script that Plaintiff was carrying. The script appeared to be a cover story written for Plaintiff by a third party. Tr. Friedland, April 19 at 36.

71. Each of the Customs inspectors who testified at trial agreed that the script was a "red flag," "highly suspicious," and indicative of someone entering the United States with illegal drugs. Tr. Lavenka, April 20, at 67-68; Tr. Smith, April 20 at 130-131, 137; Tr. Cappuccio, April 21 at 36; Tr. Fortin, April 21 at 17-18, 22-24.

72. Consider the script in context: Plaintiff told SI Friedland that she was in Jamaica to visit her husband; Plaintiff could not answer SI Friedland's routine questions about her husband; many answers to SI Friedland's questions were provided on the script. Tr. Friedland, April 19 at 39, 101.

73. At trial Plaintiff testified that at the time of her detention she was carrying immigration documents for Richard Scott's immigration to the United States. Plaintiff testified that the script was tailored to the interview that she and her husband, Richard Scott, were going to have with immigration officials. Tr. Denson, April 21 at 144.

74. SI Friedland testified, however, that Plaintiff did not show her these immigration documents. Tr. Friedland, April 18 at 74; Tr. Friedland, April 19 at 40.

75. Plaintiff also testified that she was carrying photographs from her wedding to Richard Scott for their interview with immigration officials. Tr. Denson, April 21 at 152, 154; Pl. Trial Ex. 59-B-G.

76. No matter what the true purpose of this script may have been, whether to hoodwink immigration officials or to hoodwink Customs officials, the fact remains that SI Friedland, was confronted with this highly unusual document in conjunction with other suspicious indicators.

77. Plaintiff was traveling with an Affidavit of Citizenship in lieu of a passport. This affidavit of citizenship is a travel document that experienced inspectors had not previously seen and did not know that one could travel with to Jamaica. Tr. Friedland, April 18 at 123; Tr. Friedland, April 19 at 47; Tr. Flynn, April 19 at 149-150; Tr. Lavenka, April 19 at 214, Tr. Smith, April 20 at 139-140.

78. Plaintiff exhibited many indications of nervousness that inspectors are trained to look for, including heavy breathing and avoiding eye contact. Tr. Smith, April 20 at 133; Tr. Cappuccio, April 21 at 34.

79. "When used by trained law enforcement officers, objective facts, meaningless to the untrained, can be combined with permissible deductions from such facts to form a legitimate basis for suspicion of a particular person . . . ." *United States v. Cortez,*

449 U.S. 411, 419 (1981); *see Vega-Barvo*, 729 F.2d at 1350 (quoting *Cortez*).

80. Moreover, the credible evidence reveals that the facts presented to SI Friedland provide precisely the sort of suspicious circumstances the Court of Appeals found lacking in *Brent v. Ashley*, 257 F.3d 1294 (11th Cir. 2001).

81. In *Brent*, the Court of Appeals held that the officers did not have reasonable suspicion based on the plaintiff's nervousness and her travel from a known drug source city because, among other things, "Brent presented verifiable residence and employment information" and "a check of Brent's name in the Treasury Enforcement Computer System revealed nothing suspicious." 247 F.3d at 1301.

82. The facts presented to the Customs officials in this case, considered in the totality, provide a sufficient basis upon which Customs officials could reasonably have suspected Plaintiff of internal narcotics smuggling.

83. "As a search progresses from a stop, to a pat-down search, to a strip search, an agent must reevaluate whether reasonable suspicion to justify the next level of intrusion exists in light of the information gained during the encounter." *Brent*, 247 F.3d at 1300 (citing *Vega-Barvo*, 729 F.2d at 1349).

84. The Customs officers' actions, from the pat down to transport to Jackson Memorial Hospital, were reasonable in light of the overwhelming evidence that provided the officers with reasonable suspicion that Plaintiff was an internal narcotics carrier.

85. These circumstances convinced Customs inspectors with years of experience and knowledge of the circumstances under which internal carriers attempt entry into the United States, that Plaintiff was indeed an internal carrier.[9]

---

9. This Court is mindful of the plethora of cases in which the Eleventh Circuit Court of Appeals has assessed a variety of reasonable suspicion determinations in criminal cases in which defendants have sought to suppress evidence of their internal smuggling. The facts of those cases are no more extensive in finding reasonable suspicion than the facts in this case. In *United States v. Saldarriaga-Marin*, 734 F.2d 1425 (11th Cir. 1984), Marin was wearing a party dress which inspectors though unusual for travel attire, the ticket had similarities to another traveler in custody, she was nervous, and the passenger stated that she was going to visit a relative, but could not give the address or telephone number for the relative. The court held that those factors constituted reasonable suspicion to conduct an x-ray exam. The x-ray of passenger Marin was inconclusive. A laxative was given to the traveler to induce a bowel movement, which the court upheld. In *United States v. Mosquera-Ramirez*, 729 F.2d 1352 (11th Cir. 1984), the court held that a person who refuses an x-ray search may be detained until a bowel movement occurs through natural body functions. In that case, the court upheld holding the traveler for a monitored bowel movement based on inconsistent answers which led to a more thorough search, where the defendant became more nervous and evasive.

(Cont'd)

86. Customs officials are entitled to broad discretion to search persons entering the United States to prevent the importation of contraband.

87. As described by the Supreme Court, alimentary canal smuggling of narcotics is a frequently utilized method that is very difficult to detect. *Montoya*, 473 U.S. at 539.

(Cont'd)

In *United States v. Pino*, 729 F.2d 1357, 1359 (11th Cir. 1984), the court upheld a rectal exam of the traveler, finding it justified by travel from a source county, inconsistent clothing for the travel purpose, cash ticket purchased by another, and evasive answers provided in a nervous manner. In *United States v. Vega-Barvo*, 729 F.2d 1341, 1344 (11th Cir. 1984), the court held that reasonable suspicion exists for a search, even where it is based substantially on the inability to give a credible explanation for a trip to the United States, traveling alone, nervous, with only one piece of luggage, and a ticket purchased by another. "Since swallowers follow a different mode of operation, customs agents' suspicions will be aroused by different factors. For example . . . the traveler's inability to explain his or her trip. . . ." *Vega-Barvo*, 729 F.2d at 1350. Moreover the facts assessed by the Supreme Court in *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985), were far less suspicious than those presented to the Customs officials in this case. In *Montoya*, suspicions were aroused by the number of trips the traveler had taken, her arrival from a source city, suspicious answers given to questions, and possessions inconsistent with the purpose of the trip. Plaintiff was wearing two pairs of elastic underpants with a paper towel lining, had not taken food or drink, resisted the calls of nature, and had a rigid and firm stomach.

88. To counter this deceptive importation method, a Customs inspector is entitled to make a "common sense" assessment of a person's behavior taking into account various circumstances that may suggest a need for further investigation. *Montoya*, 473 U.S. at 542.

89. From the perspective of an officer at the border who routinely engages the traveling public and has experience in the interdiction of narcotics that are being brought into this country illegally, officers presented with this type of evidence would have been remiss in their duties had they not followed through.

90. Accordingly, this Court holds as a matter of law, that Customs officials had reasonable suspicion to justify each non-routine search of Plaintiff.

91. Because this Court determines that the United States Customs officials acted with reasonable suspicion and that their actions were reasonable, Plaintiff's claims under the Federal Tort Claims Act must necessarily fail.

92. With respect to Plaintiff's claims for assault and battery, the Court finds that any use of force was objectively reasonable and privileged under the circumstances.

93. With respect to Plaintiff's claim for false imprisonment or false arrest, Plaintiff must show

that the restraint was "unreasonable and unwarranted under the circumstances." *Harris v. Lewis State Bank,* 436 So. 2d 338, 341 (Fla. Dist. Ct. App. 1983) (internal citations omitted).

94. Because this Court finds that the actions of the United States Customs officials were reasonable and based on reasonable suspicion, Plaintiff's claim for false imprisonment/arrest necessarily must fail.

95. With respect to Plaintiff's claim for intentional infliction of emotional distress, based on the Court's conclusions that the Customs officers had reasonable suspicion to conduct the non-routine border searches of Plaintiff and that the Customs officers did not use excessive force or assault or batter Plaintiff, the Court finds that Plaintiff has failed to establish by a preponderance of the credible evidence that the Customs officers engaged in extreme or outrageous conduct. [10, 11]

---

10. Based on the Court's conclusion that the Plaintiffs have failed to show that the Customs officers engaged in any extreme and outrageous conduct, the Court need not address Plaintiffs' evidence with respect to the other elements of a claim for intentional infliction of emotional distress.

11. Because Plaintiff Taylor Jordan's claims are derivative of Janneral Denson's claim, his claims under the FTCA must necessarily fail.

Appendix B

CONCLUSION

Accordingly, based on the foregoing it is

ORDERED AND ADJUDGED that Judgment is entered for Defendant United States of America on Count XI, the FTCA claims of the Second Amended Complaint. Defendant shall move for final judgment within ten (10) days from the date of this Order.

DONE AND ORDERED in Chambers at Miami, Florida, this 5th day of August, 2005.

s/ K. Michael Moore
K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED JANUARY 29, 2003

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ELEVENTH CIRCUIT

No. 02-11788
Non-Argument Calendar

D.C. Docket No. 98-07256-CV-KMM

JANNERAL DENSON,
JORDAN L. TAYLOR GUARDIANSHIP,
a minor, Janneral Denson, Guardian,

Plaintiffs-Appellees,

versus

PUBLIC HEALTH TRUST OF DADE COUNTY, FLORIDA, d.b.a Jackson Memorial Hospital, IRA CLARK, individually and as President/Director of Jackson Memorial Hospital, et al.,

Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

(January 29, 2003)

Appendix C

Before TJOFLAT, BIRCH and BLACK, Circuit Judges.

PER CURLAM:

United States Customs Service inspectors Dennis Flynn, Cheryl Friedland, and Lee Lavenka (federal defendants); and John Bennett, M.D., Ileana Hollant, R.N., Marie Prospere, R.N., and Doreen Simmons, R.N. (hospital defendants), appeal the district court's denial of their motions for summary judgment in this § 1983 action brought by Appellee Janneral Denson.

We review *de novo* a district court's summary judgment decision, applying the same legal standards as the district court. *Brent v. Ashley*, 247 F.3d 1294, 1299 (11th Cir. 2001). "Summary judgment is appropriate only when the evidence before the court demonstrates that 'there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.' Fed.R.Civ.P. 56(c)." *Id.*

A. Claims Against Federal Defendants

The federal defendants contend the evidence demonstrates they had reasonable suspicion to search and detain Appellee, and the district court therefore improperly determined their actions violated Appellee's constitutional rights. The federal defendants further contend, even if their searches and detention violated Appellee's constitutional rights, they were acting on "arguable" reasonable suspicion, and they are therefore entitled to qualified immunity. *See Jackson v. Sauls*, 206 F.3d 1156, 1166 (11th Cir. 2000).

Appendix C

In reviewing the district court's denial of summary judgment based on qualified immunity, we must first determine whether Appellee alleged the deprivation of a constitutional right, and, if so, whether the right was clearly established at the time of the alleged violation. *McElligott v. Foley*, 182 F.3d 1248, 1254 (1999). Routine border searches of the bodies or possessions of entrants to the United States are constitutional regardless of the custom agents' reasonable suspicion, probable cause, or acquisition of a warrant. *United States v. Montoya de Hernandez*, 473 U.S. 531, 538, 105 S. Ct. 3304, 3309 (1985). *Detention* of an entrant, on the other hand, is only justified "if customs agents considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband." *Brent*, 247 F.3d at 1300 (quoting *Montoya de Hernandez*, 473 U.S. at 541). Reasonable suspicion is "more than an inchoate and unparticularized suspicion or hunch," and requires that an official have a "particularized and objective basis for suspecting" a person of smuggling. *Id.* (internal citations omitted). "[R]easonable suspicion to justify a strip search can *only* be met by a showing of articulable facts which are particularized as to the place to be searched. . . ." *Id.* (quoting *United States v. Vega-Barvo*, 729 F.2d 1341, 1349 (11th Cir. 1984). As a search progresses, a customs agent must reevaluate at each stage whether reasonable suspicion exists to justify the next level of intrusion, in light of facts theretofore accumulated. *Id.* Highly intrusive searches like body cavity examinations require an even greater degree of suspicion. *United States v. Pino*, 729 F.2d 1357, 1359 (11th Cir. 1984).

Our examination of the parties' briefs and the record on appeal reveals no error in the district court's denial of the federal defendants' motion for summary judgment or its determination that the federal defendants were not entitled to qualified immunity. Our prior cases have consistently held that reasonable suspicion is required before customs agents can constitutionally conduct highly intrusive searches, such as the bathroom search and pelvic examination of Appellee, and the fruitless searching of an entrant's luggage and the failure to elicit suspicious information on questioning is insufficient to create reasonable suspicion. *Brent*, 247 F.3d at 1303-04 (citing *United States v. Afanador*, 567 F.2d 1325, 1330 (5th Cir. 1978)). Furthermore, the law in this circuit is clearly established that customs inspectors cannot conduct strip searches merely because an entrant fits a "generalized courier profile." *Brent*, 247 F.3d at 1304 (citing *Reid v. Georgia*, 448 U.S. 438, 441, 100 S. Ct. 2752 (1980) (per curiam)). The court properly concluded that a reasonable customs inspector acting in the federal defendants' stead would have known that the non-particularized, general concerns evoked by Appellee's appearance and actions did not create sufficient probable cause to justify the intrusive searches. Based on the foregoing, we AFFIRM the order to the extent that it denied the federal defendants' motion for summary judgment based on qualified immunity.

B. Claims Against Hospital Defendants

The hospital defendants contend the district court erred by failing to consider their qualified immunity

defense to Appellee's allegations that they were deliberately indifferent to her medical needs, "'[D]eliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain," proscribed by the Eighth Amendment.'" *McElligott*;182 F.2d at 1254 (quoting *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 291 (1976)). In order to demonstrate deliberate indifference to a serious medical need, a claimant must show: (1) the defendant had subjective knowledge of a risk of serious harm; (2) the defendant disregarded that risk; (3) by conduct that was more than mere negligence. *McElligott*, 182 F.2d at 1255.

Prior to dissecting the various claims against various defendants asserted by Appellee in Counts VI and VII of her complaint, the district court engaged in a thorough discussion of the limitations on Appellee's ability to recover damages from the hospital defendants. *Denson v. United States*, No. 98-7256-CIV, slip op. at 32-34 (S.D. Fla. Jan. 29, 2002). The court declined, however, to consider the possibility that the hospital defendants might be entitled to qualified immunity on Appellee's § 1983 and § 1985 claims. *Id.* at 35 n.57. Given the procedural history of this case, we can understand why the court might have reached this conclusion. It was, unfortunately, error. We have consistently held that defendants charged with deliberate indifference under § 1983 and § 1985 may be entitled to qualified immunity, *See Marsh v. Butler County, Ala.*, 268 F.3d 1014, 1030 (11th Cir. 2001) (en banc); *Lassiier v. Ala. A&M Univ.*, 28 F.3d 1146, 1149 (11th Cir. 1994) (en banc). At the

summary judgment stage of the case, the district court should consider the hospital defendants' qualified immunity defense. We therefore REVERSE and REMAND for further proceedings with regard to the portion of the order that denied the hospital defendants' summary judgment motion.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DISMISSING APPEAL NO. 04-16392-DD FOR LACK OF JURISDICTION DATED AND FILED MARCH 17, 2005

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 04-16392-DD

JANNERAL DENSON,
JORDAN L. TAYLOR,
a minor, Janneral Denson, Guardian,

Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA,
JOHN & JANE DOES, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

Before TJOFLAT, DUBINA, and MARCUS, Circuit Judges.

BY THE COURT:

This appeal is DISMISSED for lack of jurisdiction. The district court's November 5, 2004, order is not final

and appealable as it does not resolve all claims of all parties, and was not certified for an immediate appeal pursuant to Fed.R.Civ.P. 54(b), 28 U.S.C. § 1291; *Williams v. Bishop*, 732 F.2d 885, 885-86 (11th Cir. 1984). Moreover, the order does not fall within the collateral order exception identified in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949).

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED OCTOBER 6, 2009

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 05-15572-CC

JANNERAL DENSON,
JORDAN L. TAYLOR, a minor,
Janneral Denson, Guardian,

Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA, JOHN & JANE DOES, certain unnamed United States Customs Agents, individually and in their official capacities as United States Customs Agents, PUBLIC HEALTH TRUST OF MIAMI-DADE COUNTY, d.b.a. Jackson Memorial Hospital, IRA CLARK, individually and as President/ Director of Jackson Memorial Hospital, JOHN & JANE DOES, DRS., certain unnamed Doctors and Nurses employed by Jackson Memorial Hospital, individually and in their official capacities as Doctors and Nurses employed by Jackson Memorial Hospital, et al.,

Defendants-Appellees.

Appendix E

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: TJOFLAT, CARNES and HILL, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
MAY 7 - 2010
OFFICE OF THE CLERK

No. 09-803

In the Supreme Court of the United States

JANNERAL DENSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in affirming judgment for two individual Customs Service officers on petitioners' Fourth Amendment claims, brought under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

2. Whether the court of appeals erred in affirming judgment for the United States on petitioners' claims under the Federal Tort Claims Act.

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In the Supreme Court of the United States

No. 09-803

JANNERAL DENSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-77a) is reported at 574 F.3d 1318. The opinions of the district court (Pet. App. 78a-118a; App., *infra*, 1a-23a, 24a-49a[1]) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 2009. A petition for rehearing was denied on October 6, 2009 (Pet. App. 127a-128a). The petition for a writ of certiorari was filed on January 4, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Two relevant opinions of the district court were not appended to the petition and are therefore included in an appendix to this brief.

STATEMENT

1. On February 12, 1997, petitioner Janneral Denson (petitioner) flew from Miami to Jamaica. Pet. App. 4a. She stayed in Jamaica for less than two days, then returned to the United States carrying only a purse, a manila folder, and a small bag. *Id.* at 7a. Petitioner returned to the United States through the Fort Lauderdale International Airport. *Id.* at 4a.

Because South Florida is "a notorious entry point for narcotics smugglers," the United States Customs Service employs several levels of screening at South Florida airports. Pet. App. 3a. When a passenger deplanes, she first passes through a primary checkpoint, where inspectors check her documents and ask routine questions about the purpose of her trip. *Ibid.* If nothing appears out of the ordinary, the inspector clears the passenger for entry into the United States. *Ibid.* Before the passenger reaches the main terminal, there is a second checkpoint, where Customs inspectors scan the crowd to look for any unusual or suspicious activities. *Id.* at 3a-4a.

When petitioner's plane arrived in Fort Lauderdale, Customs inspectors were "on high alert," because Jamaica is known to be a source country for smuggling narcotics into the United States. Pet. App. 3a-4a. After deplaning in Fort Lauderdale, petitioner cleared the first customs checkpoint. *Id.* at 4a-5a. In the secondary screening area, petitioner came to the attention of a senior Customs Service inspector—respondent Cheryl Friedland. *Id.* at 5a. Inspector Friedland noted that petitioner had no checked luggage, was attempting to quickly exit the Customs area, was traveling alone, was avoiding eye contact, and was pregnant—a fact made relevant by smugglers' practice of using pregnant wo-

men as drug couriers because they cannot be x-rayed. *Ibid.* Inspector Friedland called out to petitioner. *Ibid.* Even though petitioner was less than five feet away from Inspector Friedland, she did not stop. *Ibid.* Inspector Friedland caught up with petitioner and escorted her to a screening area for questioning. *Ibid.*

Petitioner had significant difficulty in answering routine questions about her trip and exhibited signs of nervousness. Pet. App. 5a-6a. Petitioner was avoiding eye contact, breathing heavily, sweating profusely, and holding on to an x-ray machine to avoid shaking. *Id.* at 5a. Based on her training and experience, Inspector Friedland identified petitioner's behavior and demeanor as indications that she was carrying contraband. *Ibid.*

Although petitioner contended that the purpose of her trip was to visit her husband, who lives in Jamaica, petitioner could not recall his address or phone number. Pet. App. 6a. When asked who purchased her plane ticket—bought only four days prior to the trip—petitioner first said that she did not know, and then said that a man named Osmond had done so, but that she did not know his last name. *Ibid.* Inspector Friedland considered these answers significant, because "internal narcotics smugglers often take short trips to limit expenses and increase the overall profitability of their trip," and "third-party booking * * * is a familiar method smugglers employ to avoid revealing their identity." *Id.* at 6a-7a.

When asked whether she was employed, petitioner stated that she worked for Office Depot. Pet. App. 6a. But when Inspector Friedland called the number that petitioner provided for that employer, it had been disconnected. *Ibid.* "Customs trains its inspectors to take note when persons provide unverifiable employment

information, as narcotics smugglers are often unable to provide such specific information." *Id.* at 7a.

Inspector Friedland searched petitioner's belongings, which consisted of a manila folder, purse, and small carry-on bag. Pet. App. 7a. Petitioner had in her possession two $100 bills, an affidavit of citizenship (in lieu of a passport), and a tablet with handwritten information about her husband "that appeared to be a cover story written for [her] by a third party." *Ibid.* The tablet read:

> Richard Scott—Poultry Farmer Since 1994
>
> Lives @ Belfast Near Morant Bay in the Parish of Saint Thomas
>
> His birthday is: Feb. 17th (Born 1972)
>
> *How you met.*
>
> Dec. 1995 A friend invited you to Jamaica while there went to the beach Dunns River met him there
>
> Dec. 1996 He visited you at your friends Saint Anne home you invited him at his Saint Thomas home
>
> * You had no prior knowledge of him
>
> You returned home to Florida—Telephone Exchange
>
> * Always used calling cards—Price Reasons
>
> March 1996 You went down to visit him in Jamaica.
>
> Oct. 1996 You went back to marry him
>
> * His phone number written down at home 809 something
>
> You are not good with remembering numbers.
>
> * NOT HIS PHONE ANYWAY Neighbors' Phone.

> ANY OTHER Questions Just answer something in that case try to remember what you were asked and what you answered.
>
> * DOES HE HAVE RELATIVES OR FRIENDS IN THE U.S. THAT YOU KNOW OF—NO—

Id. at 8a-9a. Petitioner stated that she did not know who wrote the script. *Id.* at 9a. Inspector Friedland asked petitioner to write down the answers to her questions so she could compare the handwriting to that on the script; the handwriting samples did not match. *Id.* at 9a n.8.[2]

Inspector Friedland then searched for information concerning petitioner in the Treasury Enforcement Communications System (TECS), a database that identifies persons who are suspected of terrorism, narcotics trafficking, money laundering, probation violations, or who have outstanding warrants. Pet. App. 9a-10a & n.9. TECS returned a lookout notification for petitioner, which stated:

> REFER TO CUSTOMS FOR ENFORCEMENT EXAM. ACQUIRED TRAVEL DOCUMENTS SHORTLY BEFORE DEPARTURE. MATCHES HI RISK NARCO-TARGETING INDICATORS. (IF ARRIVING FROM A SOURCE COUNTRY).

Id. at 10a. This alert had been entered in November 1996, and for 90 days thereafter would have required a Customs agent at the primary screening checkpoint to refer petitioner for a secondary screening like the one Inspector Friedland conducted. *Ibid.* While the mandatory screening period expired two weeks prior to peti-

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[2] At trial, petitioner testified that Osmond—the man who bought her ticket—wrote this script for her. Pet. App. 9a n.8, 86a.

tioner's trip, the lookout remained in the TECS system for a year and was displayed when Inspector Friedland entered petitioner's name and date of birth. *Ibid.*

Inspector Friedland asked petitioner further questions, which she continued to have difficulty answering. Pet. App. 10a. Petitioner told Inspector Friedland that she had traveled to Jamaica with a friend named Shelita Jacobs. *Ibid.* Inspector Friedland was unable to confirm in a computer database that Jacobs had been traveling with petitioner. *Ibid.* Petitioner also stated that she had visited a friend named Coreen in Jamaica, but could not provide this friend's last name. *Ibid.* At this point, "based on her twenty-one years of experience as a Customs inspector, [Inspector] Friedland concluded that [petitioner] was likely carrying narcotics inside her body." *Ibid.*

Shortly after Inspector Friedland completed her questioning, petitioner asked to use the bathroom. Pet. App. 11a. With her supervisor's approval, Inspector Friedland patted petitioner down prior to the bathroom visit. *Ibid.* As required by Customs policy, Inspector Friedland and a female colleague monitored petitioner while she used the restroom and, when she finished, inspected the toilet paper, the contents of the toilet, and petitioner's undergarments. *Ibid.* No contraband was found. *Ibid.* Inspector Friedland then placed petitioner in handcuffs and read her *Miranda* rights. *Ibid.*

Inspector Friedland obtained approval from respondent Lee Lavenka, who was a Supervisory Customs Inspector and the Acting Port Director, to transport petitioner to Jackson Memorial Hospital as a suspected internal narcotics courier. Pet. App. 11a-12a. Based on the totality of facts gathered and reported by Inspector Friedland, Inspector Lavenka believed there was a rea-

sonable basis to detain and search petitioner to determine whether she was smuggling narcotics internally. *Ibid.*

At the hospital, petitioner was asked for a urine sample to confirm her pregnancy. Pet. App. 12a. She was then asked to lie on a hospital bed, to which she was handcuffed. *Ibid.* An obstetrician performed a pelvic examination and an ultrasound on petitioner to check on her pregnancy. *Ibid.* Hospital staff did not find any drugs when conducting those examinations, but that did not rule out the possibility that petitioner was smuggling drugs in her digestive tract. *Id.* at 12a-13a. Because petitioner's pregnancy prevented doctors from conducting an x-ray examination, she was held for additional monitoring of her bowel movements. *Id.* at 13a. Under a policy established by the hospital and the Customs Service, petitioner would be released once she passed three drug-free stool samples. *Ibid.* In order to help induce the bowel movements, a doctor prescribed a laxative called GoLytely. *Ibid.* Petitioner drank the laxative, had three drug-free bowel movements, and then was transported from the hospital back to the airport to retrieve her belongings. *Id.* at 13a-14a.[3]

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[3] Contrary to her assertion (Pet. 2, 7, 16), petitioner was not forced to drink the laxative. In her supplemental court of appeals brief, petitioner stated that she "drank the [laxative] in order to put an end to her ordeal." Pet. App. 77a n.3 (quoting brief).

Petitioner also contends (Pet. 2-3) that she had a high-risk pregnancy and that the hospital staff ignored her complaints of abdominal pains and bleeding. Petitioner cites no evidence in the record in support of her allegations, and the record in fact dispels the allegations. At trial, Inspector Friedland testified that she did not recall hearing the doctor who conducted the pelvic exam use the words "high risk"; that petitioner informed Inspector Friedland that she had experienced bleeding two days *prior to* her trip to Jamaica; and that Inspector

2. Petitioner brought suit in federal district court on behalf of herself and her son, petitioner Jordan L. Taylor, who was *in utero* at the time of the events here. Pet. App. 14a. They sued the United States, Inspector Friedland, Inspector Lavenka, and other Customs Service and hospital officials. *Id.* at 14a-15a. As the court of appeals explained, petitioners' 11-count complaint "is a prolix, discursive pleading that combines causes of action and theories of recovery in such a way as to make it exceedingly difficult, if not impossible, to grasp precisely the claims being asserted." *Id.* at 15a-16a. But only two of petitioners' claims are at issue here: the claim that Inspectors Friedland and Lavenka (the individual respondents) violated petitioners' Fourth Amendment rights and therefore are liable under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and a claim against the United States for violations of state tort law actionable under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680. See Pet. App. 15a-23a (explaining how petitioners' other claims were resolved).

Respondents and the hospital defendants moved for summary judgment. Pet. App. 21a-23a. As relevant here, the district court denied the individual respondents' request for qualified immunity on petitioners' *Bivens* claim; construing the facts in the light most favorable to petitioners, the court could not find, as a matter of law, that Inspector Friedland had sufficient particularized suspicion to justify searching petitioner in the airport bathroom or transporting her to the hospital

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Friedland, who had four prior pregnancies herself, made sure that the doctors were aware of petitioner's complaints. 98-7256 Tr. 31-34 (S.D. Fla. Apr. 19, 2005) (docket entry 376).

for further examination. 98-7256 Order 19-22 (S.D. Fla. Jan. 29, 2002) (docket entry 217).

The court of appeals affirmed the denial of qualified immunity in an unpublished, per curiam opinion. Pet. App. 119a-124a. Based upon the record developed to that point, and construing the disputed facts in petitioners' favor, the court found "no error in the district court's denial of the federal defendants' motion for summary judgment or its determination that the federal defendants were not entitled to qualified immunity." *Id.* at 122a.

3. The case proceeded to trial, with the *Bivens* claims being tried to a jury, and the FTCA claims being tried before the district court (as required by 28 U.S.C. 2402). Pet. App. 26a. At the close of all of the evidence, the district court ruled on both the FTCA claims and the *Bivens* claim from the bench. *Id.* at 27a-28a. The court later memorialized its findings of fact and conclusions of law in written orders. *Id.* at 78a-118a (FTCA claims); App., *infra*, 1a-23a, 24a-49a (*Bivens* claim).

The district court entered judgment for the United States on petitioners' FTCA claims. Pet. App. 28a. The court noted that these claims must be assessed under Florida tort law. The court determined that, under Florida law, petitioners' claim for invasion of privacy fails because that tort covers invasions of places—not body parts. *Id.* at 99a (citing *Allstate Ins. Co.* v. *Ginsberg*, 863 So. 2d 156, 162 (Fla. 2003)). Further, the court explained that for each of the other torts petitioners alleged—assault and battery, false imprisonment/false arrest, and intentional infliction of emotional distress—there is an exception under which "law enforcement officers acting within the scope of their employment are

privileged to use reasonable force to arrest or apprehend criminal suspects." *Id.* at 96a (collecting authorities); see *id.* at 97a, 98a. Accordingly, the court concluded that so long as the individual respondents acted with the requisite level of suspicion under the Fourth Amendment, they could not be liable for these torts. *Id.* at 96a-99a, 116a-117a.

The court evaluated each of the searches and detentions that took place. Pet. App. 100a-116a. The court first concluded that Inspector Friedland's questioning and pat-down search at the Fort Lauderdale International Airport were *per se* reasonable, because no suspicion is required for routine searches at Customs checkpoints. *Id.* at 100a-102a (citing, *inter alia*, *United States* v. *Montoya de Hernandez*, 473 U.S. 531 (1985)). The court then held that the inspectors' actions were reasonable with respect to the search of petitioner in the airport bathroom and her transportation to the hospital and detention there. The court explained that the Customs inspectors had "overwhelming reasonable suspicion" that petitioner was carrying narcotics internally, based on the facts that (1) petitioner arrived from a source country after a very short stay carrying no luggage except for a purse and a handbag; (2) could not provide any specific information—including the last name—of the person who had bought her ticket only four days prior to her trip; (3) made several short trips to Jamaica during the prior year; (4) was unable to provide an address or telephone number for her husband, who she claimed to be visiting; (5) could not present verifiable employment information; (6) was flagged in the TECS system as a potential drug courier; (7) was carrying an "extraordinarily peculiar script" that "appeared to be a cover story written for [petitioner] by a third

party"; (8) was traveling with "a travel document that experienced inspectors had not previously seen and did not know that one could travel with to Jamaica"; (9) was pregnant, which is known to be common for drug couriers; and (10) exhibited signs of nervousness. *Id.* at 106a-113a. Once this suspicion was established, Customs inspectors could constitutionally detain petitioner until nature took its course. *Id.* at 106a-107a (collecting authorities). "[A]s a matter of law," the court reasoned, "Customs officials had reasonable suspicion to justify each non-routine search of [petitioner]," and therefore "[petitioner's] claims under the Federal Tort Claims Act must necessarily fail." *Id.* at 116a; see *id.* at 116a-117a. Because petitioner Jordan Taylor was *in utero* at the time these events occurred, the court determined that his claims failed for the same reason. *Id.* at 79a n.1, 117a n.11.

The court then granted judgment as a matter of law to the individual respondents on the *Bivens* claim. Pet. App. 28a-29a; see App., *infra*, 1a-23a, 24a-49a (orders on *Bivens* claim).[4] The court concluded that its FTCA judgment barred the *Bivens* claim under the FTCA judgment bar, 28 U.S.C. 2676, which provides that the judgment in an action under the FTCA "shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the

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[4] The court considered only petitioner Denson's constitutional claim, because it had previously held, at the summary judgment stage, that "because Taylor was a fetus at the time of the events in question, he was not a 'person' or a 'citizen' under the Constitution, and therefore, had no constitutional rights at that time." 98-7256 Order 13 (S.D. Fla. Jan. 29, 2002) (docket entry 217). Petitioner has not challenged that ruling.

claim." See Pet. App. 28a, 31a. The court explained that the *Bivens* claim was barred by the plain terms of the judgment bar, because the statute's preclusive effect is triggered by an FTCA judgment so long as the FTCA claim and the *Bivens* claim concern the same subject matter. App., *infra*, 18a-22a.

The district court also ruled in the alternative that the individual respondents were entitled to qualified immunity on petitioner's *Bivens* claim. App., *infra*, 37a-48a. The court rejected petitioners' argument that it should deny judgment as a matter of law on the *Bivens* claim because it had previously denied respondents' motion for summary judgment, explaining that a court confronted with different evidence at trial is free to reach a different conclusion. *Id.* at 35a-37a (citing cases). Then, construing the evidence in the light most favorable to petitioner, *id.* at 35a, the court concluded that the individual respondents did not violate petitioner's Fourth Amendment rights because they had reasonable suspicion at each stage of the encounter that petitioner was smuggling drugs internally, *id.* at 37a-48a. The court explained that no reasonable factfinder could conclude that a Customs officer presented with the same facts lacked arguable reasonable suspicion. *Id.* at 40a-49a. Because it had concluded that the individual respondents were entitled to judgment as a matter of law on the *Bivens* claim, the court dismissed the jury. App., *infra*, 22a; 98-7256 Tr. 57-59 (S.D. Fla. Apr. 22, 2005) (docket entry 374).

4. The court of appeals affirmed. Pet. App. 1a-77a. The court first considered petitioner's *Bivens* claim. *Id.* at 38a-54a. After exhaustively reviewing the evidence, the court concluded that the individual respondents were entitled to qualified immunity because they did not

violate petitioner's Fourth Amendment rights. *Id.* at 40a-54a. The court explained that the routine questioning and pat-down search at the border "do not offend the Fourth Amendment" because no reasonable suspicion is required to conduct such searches at points of entry. *Id.* at 44a-45a. And the panel concluded that the totality of circumstances surrounding petitioner's arrival and answers to questioning made it "eminently reasonable for [Inspector] Friedland, especially given her experience and training, to suspect that [petitioner] was concealing contraband." *Id.* at 49a. This reasonable suspicion was sufficient to allow the federal defendants to "legally detain [petitioner] for 'the period of time necessary to either verify or dispel the suspicion,' including transporting [petitioner] to the hospital for a pelvic exam and, if necessary, monitored bowel movements." *Id.* at 51a (quoting *Montoya de Hernandez*, 473 U.S. at 544). The court rejected the notion that it was upholding the searches and detention based on "nothing more than a classic drug courier profile": here, not only had petitioner arrived from a known source country after a very short trip and carrying no luggage, but she could not answer basic questions about her trip, her husband, and her employment, and she was carrying a highly suspicious "cover story" written by someone else that appeared to provide answers to questions routinely asked by federal authorities. *Id.* at 48a-50a, 52a n.64.

The court then turned to petitioners' FTCA claims. The court noted that where, as in this case, a plaintiff's constitutional claims under *Bivens* fail, the United States may have two defenses under the FTCA. It may assert that the officers' conduct fell within the discretionary function exception to the FTCA, 28 U.S.C. 2680(a), or it may assert that the Supremacy Clause

bars the application of state tort law that would impede the officers' performance of their federal duties. Pet. App. 54a. The court relied on the latter rationale, and therefore did not address whether the discretionary function exception also barred liability under the FTCA. See *id.* at 35a-36a, 54a, 58a-65a.

The court reasoned that because States may not prosecute federal officials under state criminal law for acts performed within the scope of their federal employment, "state law liability * * * cannot attach to the acts taken by federal officers in the course of their duties and committed in compliance with federal law," where—as here—"such action was 'no more than what was necessary and proper for [the officer] to do' under the circumstances, if application of state law would impede an essential federal function." Pet. App. 54a-65a (quoting *In re Neagle*, 135 U.S. 1, 75 (1890)). The court rejected petitioner Taylor's claims for the same reason, explaining that although a child injured *in utero* who is born alive has an independent cause of action against an alleged tortfeasor under Florida law, his claims are entirely derivative of his mother's because he has no independent argument for why respondents' actions were unlawful. *Id.* at 14a n.18.

Judges Carnes concurred in the judgment. Pet. App. 66a-77a. Judge Carnes agreed with his colleagues' rejection of the *Bivens* claim on the ground that no Fourth Amendment violation occurred. *Id.* at 77a. On the FTCA claims, Judge Carnes agreed that petitioners' claims failed, but for different reasons. *Id.* at 69a-70a. First, he noted that, as petitioners pleaded the FTCA claim, it depended on their contentions that the Customs officers' actions violated their constitutional rights. *Id.* at 69a. Because the court found no constitutional viola-

tions, the FTCA claims, as petitioners presented them, necessarily fail. *Ibid.*

Second, in Judge Carnes' view, there could be no tort liability under Florida law because Florida law contains a justification defense that "frees law enforcement officers from liability for actions reasonably taken in pursuit of their duty to enforce the law." Pet. App. 69a (citing *City of Miami* v. *Sanders*, 672 So. 2d 46, 47 (Fla. Dist. Ct. App. 1996)). That defense applies here, he explained, because "the customs inspectors' actions—all the way through the final monitored bowel movement search in the hospital—were justified because the facts, taken as a whole, supported their reasonable suspicion that [petitioner] was carrying drugs in her digestive tract, and that suspicion was not allayed until after the bowel movement search." *Id.* at 74a; see *id.* at 72a-77a.

5. Petitioners filed a petition for rehearing, with a suggestion for rehearing en banc. The court of appeals denied the petition, with no judge in regular active service calling for a vote on the petition. Pet. App. 128a.

ARGUMENT

Petitioners contend (Pet. 5-17) that the district court erred in granting the individual respondents qualified immunity on the *Bivens* claim and in entering judgment for the United States on the FTCA claims. The court of appeals' judgment is correct, and the decision below does not conflict with any decision of this Court or of another court of appeals. Further review is therefore unwarranted.

1. The court of appeals correctly affirmed the district court's rejection of petitioner's *Bivens* claim. The district court reviewed the evidence carefully and concluded that the individual respondents' did not violate

petitioner's Fourth Amendment rights. App., *infra*, at 37a-48a. The court of appeals agreed. Pet. App. 38a-54a. The court explained that qualified immunity shields "[g]overnment officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established rights of which a reasonable person would have known." *Id.* at 39a (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)) (brackets in original); see, *e.g.*, *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001) (qualified immunity bars claims against government officials unless "it would be clear to a reasonable officer that [the] conduct was unlawful in the situation he confronted").

Here, the court explained, there was no Fourth Amendment violation at all. As the court of appeals recognized, "[w]hether a search or seizure is constitutionally reasonable is judged by 'balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" Pet. App. 40a (quoting *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 537 (1985)). Courts "look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing," and must "allow[] officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" *United States* v. *Arvizu*, 534 U.S. 266, 273 (2002) (quoting *United States* v. *Cortez*, 449 U.S. 411, 417-418 (1981)).

The court of appeals analyzed each search or detention and concluded that each was supported by a sufficient level of particularized suspicion. Pet. App. 40a-54a. The court found it "eminently reasonable" based

on all of the facts "for [Inspector] Friedland, especially given her experience and training, to suspect that [petitioner] was concealing contraband," *id.* at 49a, and Inspector Friedland therefore was justified in "detain[ing] [petitioner] for 'the period of time necessary to either verify or dispel the suspicion,' including transporting [petitioner] to the hospital for a pelvic exam and, if necessary, monitored bowel movements," *id.* at 51a (quoting *Montoya de Hernandez*, 473 U.S. at 544)).

Inspector Friedland's decision to stop petitioner, perform a pat-down search, and question her was constitutional. No particularized suspicion is required for such routine searches at the nation's border or upon entry to one of its international airports. *Montoya de Hernandez*, 473 U.S. at 537. Moreover, after petitioner's initial questioning, Customs inspectors had reasonable suspicion to further detain petitioner as a suspected internal narcotics courier. The totality of the circumstances here, viewed in light of Inspector Friedland's 20 years of experience as a Customs inspector, justify these searches. Petitioner was traveling without luggage; her trip lasted less than two days; she was returning from Jamaica, a source country for narcotics; she had previously taken multiple short trips to Jamaica; she was unable to provide her husband's address or phone number even though she claimed to have been visiting him; her ticket was purchased by a third party whose last name she did not know; she was pregnant, and pregnant women have increasingly been used as drug couriers; the TECS system registered an alert that petitioner should be considered high risk for narcotic trafficking if she was arriving from a source country; and she was carrying a script with questions and answers that was highly suspicious. Pet. App. 48a-49a.

Under the totality of the circumstances, those facts established sufficient particularized suspicion for the searches and detentions that took place. *Id.* at 44a-51a (citing *Montoya de Hernandez*, *supra*; *United States* v. *De Montoya*, 729 F.2d 1369, 1371 (11th Cir. 1984); *United States* v. *Pino*, 729 F.2d 1357, 1359 (11th Cir. 1984); *United States* v. *Vega-Barvo*, 729 F.2d 1341, 1344 (11th Cir.), cert. denied, 469 U.S. 1088 (1984)).[5] Although petitioner asserts (Pet. 14) that her actions were "not at all suspicious," she does not attempt to demonstrate that the district court erred in granting judgment as a matter of law or respond to the cases cited by the court of appeals that upheld similar actions under similar facts. See Pet. App. 44a-51a.[6]

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[5] Petitioners are wrong to contend (Pet. 3) that petitioner's search and detention were based on nothing more than "generalized drug courier profile allegations." As the court of appeals explained, not only was petitioner arriving from a known source country after a very short trip and carrying no luggage, but she could not answer basic questions about her trip, her husband, and her employment, and she was carrying a tablet of paper with a "cover story" for her to use with federal authorities. Pet. App. 48a-50a, 52a n.64.

[6] Petitioner contends (Pet. 15-16) that the court of appeals is "in conflict with other circuits" because the court did not "requir[e] an increasing level of suspicion to justify the increasing intrusiveness of searches." She is mistaken: the court of appeals recognized that there must be particularized suspicion tailored to each of the intrusions at issue, Pet. App. 40a, and it determined that each search or detention was justified based on the totality of the circumstances at the time, *id.* at 44a-54a.

Petitioner also contends (Pet. 4-5, 15) that the district court and court of appeals equated the search of a body with the search of a car. That is wrong. The court of appeals never made such an analogy. The district court's reference to the movie *The French Connection* was an offhand comment made at oral argument—not in any of the court's orders or opinions—to illustrate that confirming or dispelling suspicion that an

Instead, petitioner contends (Pet. 11-13) that the district court was precluded from even addressing qualified immunity at trial because the courts had denied qualified immunity at the summary-judgment stage. As an initial matter, whether the summary-judgment ruling was the law of the case is a fact-specific determination on which petitioner does not claim any disagreement in the circuits, and review should be denied on that basis. In any event, petitioner is mistaken. Petitioner has acknowledged (Pet. C.A. Br. 41) that a court is permitted to reconsider a qualified immunity defense at trial in a motion for judgment as a matter of law under Federal Rule of Civil Procedure 50, even though the court previously rejected a qualified immunity defense at the summary judgment stage. Indeed, circuit law refutes petitioner's claim (Pet. 12) that the district court's denial of summary judgment on qualified immunity here was "law of the case." See, *e.g.*, *Oladeinde* v. *City of Birmingham*, 230 F.3d 1275, 1289 (11th Cir. 2000) ("[T]he defendants were not precluded from asserting the qualified immunity defense throughout the proceedings as the facts developed."); *Swint* v. *City of Wadley*, 51 F.3d 988, 992 (11th Cir. 1995) ("Any qualified immunity defenses that do not result in summary judgment before trial may be renewed at trial, where the actual facts will be established."). This Court itself has recognized in an analogous context that "resolution of the immunity question may require more than one judiciously timed appeal." *Behrens* v. *Pelletier*, 516 U.S. 299, 309 (1996) (internal quotation marks omitted) (noting difference between legal standards for evaluating qualified immu-

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individual is smuggling drugs internally requires searching hard-to-reach parts of his or her body.

nity defense on a motion to dismiss and a motion for summary judgment).

Petitioner suggests (Pet. 11-12) that the court of appeals was precluded from affirming the grant of qualified immunity because the facts supporting the qualified immunity determination were unchanged since the prior appeal. That is wrong. At the time the district court initially denied summary judgment on qualified immunity, it placed no weight on two key pieces of evidence available to the Customs inspectors: the suspicious script, and the TECS alert identifying petitioner as a potential drug courier. 98-7256 Order 19-21 (S.D. Fla. Jan. 29, 2002) (docket entry 217). After discovery and trial, however, the district court concluded that both of these factors were highly suspicious. It called the script "extraordinarily peculiar," and noted that it "appeared to be a cover story written for Plaintiff by a third party." Pet. App. 111a. Similarly, the court concluded that the TECS alert "is significant to inspectors in assessing whether the person entering the United States is importing illegal drugs." *Id.* at 109a. In light of these materially different and developed facts, nothing prevented the district court from reconsidering its previous denial of qualified immunity. Nor was the court of appeals estopped from finding these items, and the totality of the surrounding circumstances, equally suspicious. *Id.* at 49a, 72a-73a. Were it otherwise, courts would be required to view the evidence in the light most favorable to a plaintiff at the summary-judgment stage, and then would be unable to evaluate the evidence and reach a different conclusion at the trial stage.

Finally, even if there were any error on the qualified immunity determination, petitioner's *Bivens* claim would fail based on a separate ground. As the district

court explained, the judgment bar in the FTCA barred petitioner's *Bivens* claim. See App., *infra*, 18a-22a. The judgment bar, 28 U.S.C. 2676, provides that "[t]he judgment in an action under section 1346(b)," the jurisdictional provision of the FTCA, "shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." Because the United States was entitled to judgment on petitioners' FTCA claims, the district court correctly concluded that its judgment barred any further action by them against employees of the government concerning the same subject matter (the search and detention of petitioner). As the district court explained (App., *infra*, 4a-10a), the judgment bar applies whether the final FTCA judgment is rendered in favor of a plaintiff or the government, because "Section 2676 makes no distinction between favorable and unfavorable judgments—it simply refers to '[t]he judgment in an action under section 1346(b).'" *Farmer* v. *Perrill*, 275 F.3d 958, 963 (10th Cir. 2001). For that reason as well, further review of petitioner's *Bivens* claim is unwarranted.

2. The court of appeals also correctly affirmed judgment for the United States on petitioners' FTCA claims.

a. As the court of appeals correctly explained, the FTCA is "a waiver of sovereign immunity that permits an injured claimant to recover damages against the United States where a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Pet. App. 33a (quoting *Carlson* v. *Green*, 446 U.S. 14, 28 n.1 (1980) (Powell, J., concurring in the judgment)). Petitioners first contend (Pet. 5-8) that the court erred by characterizing petitioner Taylor's claim as derivative of his

mother's. But the court of appeals did no such thing. The court of appeals recognized that petitioner Taylor was able to bring his own claim under Florida law, but it determined that the claim failed for the same reason as his mother's claim and it therefore did not consider the question of what injuries either petitioner sustained. Pet. App. 14a n.18.

Because petitioner Taylor was a six-and-a-half-month-old fetus at the time of the search at issue, he had no argument independent from his mother that the individual respondents acted unreasonably, as would be required for his tort claims to succeed under Florida law. Cf. *Scales* v. *United States*, 685 F.2d 970, 974 (5th Cir. 1982) ("The treatment accorded his mother is inherently inseparable from the treatment accorded Charles as a fetus in his mother's body."), cert. denied, 460 U.S. 1082 (1983). Because petitioner Taylor and his mother were inherently inseparable for purposes of analyzing reasonable suspicion for the searches (even if, as petitioners suggest, their injuries can be analyzed separately), the individual respondents' reasonable suspicion that his mother was smuggling drugs internally extended to petitioner Taylor. On the basis of that suspicion, the individual respondents had legal authority to conduct the search, and the court of appeals properly rejected petitioner Taylor's tort claims as derivative of his mother's tort claims.

Contrary to petitioners' contention (Pet. 6), there is no disagreement on the circuits on this point. Like the cases petitioners cite (*ibid.*), the court of appeals here recognized that "local law governs whether a claim is

derivative." Pet. App. 14a n.18.[7] And contrary to petitioners' suggestion (Pet. 6-7), the court specifically recognized that "[u]nder Florida law, a child who suffers prenatal injuries and is born alive has an independent cause of action against the alleged tortfeasor." Pet. App. 14a n.18.[8] But because the court found against petitioners on the dispositive issue of *liability*, it had no need to address whether they suffered separately compensable *injuries*. *Ibid.* There is no error warranting this Court's review.

b. Petitioners also contend (Pet. 8-11) that the court of appeals erred in affirming judgment for the United States on the FTCA claims. The court's conclusion was correct.

The Federal Tort Claims Act waives the government's sovereign immunity for "injury or loss of property * * * caused by the negligent or wrongful act

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[7] None of the cases petitioners cite (Pet. 6) from other courts of appeals address the situation of a child allegedly injured when *in utero* and then born alive. Instead, they address a survivor's claim for wrongful death of a family member, where the survivor was alive at the time of the death. See *Schwarder* v. *United States*, 974 F.2d 1118, 1122 (9th Cir. 1992); *Fisk* v. *United States*, 657 F.2d 167, 171-172 (7th Cir. 1981); *Montellier* v. *United States*, 315 F.2d 180, 185-186 (2d Cir. 1963).

[8] That holding is fully consistent with *Del Rio* v. *United States*, 833 F.2d 282, 286-288 (11th Cir. 1987), and even if it were not, an intra-circuit disagreement would not furnish a basis for this Court's review. *E.g.*, *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). The other cases petitioners cite (Pet. 6 n.1) do not address whether a child who suffered injuries while *in utero* and then was born alive has a separate cause of action for his injuries. See *R.J.* v. *Humana of Fla., Inc.*, 652 So. 2d 360, 363 (Fla. 1995); *Champion* v. *Gray*, 478 So. 2d 17, 19-20 (Fla. 1985); *Metropolitan Life Ins. Co.* v. *McCarson*, 467 So. 2d 277, 278 (Fla. 1985); *Agency for Health Care Admin.* v. *Associated Indus. of Fla., Inc.*, 678 So. 2d 1239, 1252 (Fla. 1996), cert. denied, 520 U.S. 1115 (1997).

or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b). To establish liability under the FTCA, a claimant must show that a private person would be liable for the same acts under state law. See 28 U.S.C. 1346(b), 2674.

As the court of appeals recognized, petitioners' FTCA claim depends on whether they could recover for the alleged torts—assault and battery, false imprisonment/false arrest, and intentional infliction of emotional distress—under Florida law. Pet. App. 33a. As the district court and the concurring judge on the court of appeals correctly concluded, petitioners' FTCA claims fail under state law because Florida law recognizes a defense to each of the torts alleged for actions that are privileged by law. *Id.* at 69a (Carnes, J., concurring); *id.* at 96a (district court).[9] Thus, so long as the individual respondents acted with the level of reasonable suspicion required by the Fourth Amendment, plaintiffs cannot establish that their acts were tortious. *Id.* at 96a-99a, 116a-117a. As explained *supra*, pp. 16-18, the individual respondents acted reasonably at each

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[9] See, *e.g.*, *O'Brien* v. *Food Fair Stores, N. Dade, Inc.*, 155 So. 2d 836 (Fla. Dist. Ct. App. 1963) (law enforcement officers acting within the scope of their employment are privileged to use reasonable force to arrest or apprehend criminal suspects); *Harris* v. *Lewis State Bank*, 436 So. 2d 338, 341 (Fla. Dist. Ct. App. 1983) (false imprisonment or arrest require that the imprisonment or restraint be "unlawful" and "unreasonable and unwarranted under the circumstances"); *Metropolitan Life Ins. Co.*, 467 So. 2d at 278-279 (citation omitted) (intentional infliction of emotional distress does not apply to conduct that is "privileged under the circumstances").

stage of the search and detention, and there was no Fourth Amendment violation.

On appeal, petitioners did not challenge the district court's legal conclusion that, so long as the individual respondents were acting reasonably under the Fourth Amendment, the United States is not liable to them under Florida law and therefore under the FTCA. Instead, petitioners argued (C.A. Br. 27-36) that the restroom and hospital searches were not supported by reasonable suspicion. The court of appeals rejected that fact-bound argument, and petitioners have not demonstrated that any of the district court's factual findings were clearly erroneous or that the court of appeals erred in its legal conclusion, which was based on numerous decisions in which courts have upheld similar actions under similar facts. See pp. 16-18, *supra*. For that reason, petitioners' FTCA claims must fail.

c. The court of appeals held that petitioners' FTCA claims are barred by the Supremacy Clause. We agree with the court's premise that Congress could not have intended that the United States would be held liable for the actions of its law enforcement officers that were constitutional and within the scope of their official duties, because such conduct would ordinarily be privileged. In an action under the FTCA, however, that protection for the actions of law enforcement officers, irrespective of the Supremacy Clause, is located in the FTCA itself. In this case, the officers' actions were privileged as a matter of state law. Because there is no liability under state law, there is no need to consider whether liability is precluded as well on other grounds under the FTCA, such as the discretionary function exception in 28 U.S.C. 2680(a) (a ground the court of appeals did not reach, see Pet. App. 54a) or principles im-

plicit in the FTCA and derived from other privileges or immunities of federal officers from the application of state law. Although the court of appeals did not analyze the issue in that way, any error would be irrelevant to the disposition of this case. After all, both the district court's state-law holding (see also *id.* at 69a-70a (Carnes, J., concurring)) and the panel majority's Supremacy Clause rationale share the same fundamental premise: the individual respondents cannot be liable because they were acting reasonably in conducting their official duties. *Id.* at 54a-55a, 63a. As explained above, petitioners' claim must fail because they have not shown that the search and detention were unreasonable. Indeed, as also noted above, petitioners did not challenge on appeal the district court's legal conclusion that the United States is not liable under the FTCA if the officers' conduct was reasonable under the Fourth Amendment and thus consistent with Florida law. See p. 25, *supra*.

Petitioners do not identify any other court of appeals that has expressly addressed the argument whether a FTCA claim may be barred because the imposition of liability under state law would violate Supremacy Clause principles. Instead, they cite (Pet. 9-10) other cases that stand for the proposition that FTCA liability generally depends on the law of the place where the allegedly tortious acts occurred.[10] The court of appeals

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[10] See *FDIC* v. *Meyer*, 510 U.S. 471, 477-478 (1994); *Dalrymple* v. *United States*, 460 F.3d 1318, 1326-1327 (11th Cir. 2006); *Ochran* v. *United States*, 273 F.3d 1315, 1317 (11th Cir. 2001); *Johnson* v. *Sawyer*, 47 F.3d 716, 727-729 (5th Cir. 1995); *Friedman* v. *United States*, 927 F.2d 259, 261-262 (6th Cir. 1991); *Caban* v. *United States*, 728 F.2d 68,

did not dispute that point. Indeed, it agreed with that proposition, Pet. App. 33a; see also *id.* at 68a (Carnes, J., concurring), but held that if Florida law imposed liability in this particular situation, it would be barred by a federal privilege in the particular circumstances of this case. *Id.* at 54a-65a (citing *In re Neagle*, 135 U.S. 1, 75 (1890)). Because there is no disagreement in the circuits on this point, and because Florida tort law itself compels judgment for the respondents by recognizing a privilege for the challenged conduct, there is no reason for this Court to consider petitioners' fact-bound claims. Further review is therefore unwarranted.

72-74 (2d Cir. 1984); *Birnbaum* v. *United States*, 588 F.2d 319, 327-328 (2d Cir. 1978); see also 28 U.S.C. 1346(b).

Petitioners contend (Pet. 9) that there is "a conflict between and within the circuits as to whether the government's liability" under 28 U.S.C. 2680(h) "is to be analyzed under federal or state law." Section 2680(h) makes the United States liable for "acts or omissions of investigative or law enforcement officers of the United States Government" constituting "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." 28 U.S.C. 2680(h). Petitioners' citations are inapposite, because the court of appeals did not rely on the law enforcement proviso in Section 2680(h) or state that federal law defines its scope; as explained *supra*, pp. 24-26, the court recognized that state law applies but found that state law must yield under the Supremacy Clause.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2010

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 98-7256-CIV-MOORE

JANNERAL DENSON AND JORDAN L. TAYLOR, A MINOR, THOUGH HIS LEGAL GUARDIAN, JANNERAL DENSON, PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

[Filed: Aug. 22, 2005]

ORDER

THIS CAUSE comes before the Court after a four-day trial in Miami, Florida, from April 18, 2005, through April 21, 2005. Plaintiffs filed an action against the United States of America and against United States Customs Inspectors Cheryl Friedland and Lee Levanka (the "individual Defendants").[1] From the United States Plaintiff sought damages under the Federal Torts Claims Act ("FTCA") for circumstances surrounding her detention by United States Customs officials at the Ft. Lauderdale International Airport on February 14, 1997.

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[1] Plaintiff voluntarily dismissed Senior Inspector Flynn following his direct trial testimony. Tr. Flynn, April 19 at 188.

From the individual Defendants Plaintiff sought damages under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), for violations of her constitutional rights arising out of the same facts. The FTCA action was tried to the bench while simultaneously the Bivens action was tried to a jury.

The Court, having heard four days of trial testimony, having reviewed the applicable pleadings, received evidence, and reviewed the applicable law found against Plaintiff and in favor of the United States in the Federal Tort Claims Act action.

Subsequently, the individual Defendants argued that because this Court had entered judgment on Plaintiff's FTCA action, Plaintiff's Bivens action was precluded by 28 U.S.C. § 2676. This Court agreed and dismissed the Bivens action.[2] The Court enters the following Order to that effect.

I. THE JUDGMENT BAR

The 28 U.S.C. § 2676 judgment bar provides that:

> The judgment in an action under section 1346(b) of this title [27 USCS § 1346(b)]
>
> shall constitute a complete bar to any action by the claimant by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

28 U.S.C. § 2676.

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[2] Alternatively, this Court found that if the judgment bar does not apply, the individual Defendants were nevertheless entitled to qualified immunity. The Court will address the qualified immunity issue by separate order.

Plaintiff contends that the judgment bar set forth in 28 U.S.C. § 2676 is not applicable to a Bivens action. Plaintiff argues that after the Supreme Court's decision in *Carlson v. Green*, 446 U.S. 14 (1980), Congress amended the FTCA with the Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly referred to as the Westfall Act. 28 U.S.C. § 2679(b)(2)(A) ("The Westfall Act"). In enacting the Westfall Act, Plaintiff argues, Congress specifically exempted a Bivens action from the FTCA's § 2676 judgment bar.

The Westfall Act states in relevant part that:

> (b) (1) The remedy against the United States provided by sections 1346(b) and 2672 of this title [28 USCS §§ 1346(b) and 2672][3] for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's es-

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[3] The Federal Torts Claims Act waived the United States Government's sovereign immunity for the torts of its employees by granting the federal district courts jurisdiction over suits for damages "caused by the negligent or wrongful act or omission of any employee of the Government." 28 U.S.C. § 1346(b).

> tate is precluded without regard to when the act or omission occurred.
>
> (2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—
>
> (A) which is brought for a violation of the Constitution of the United States, or
>
> (B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

28 U.S.C. § 2679.

Plaintiff argues that this addition to the FTCA, which specifically states that the restriction barring additional actions "does not extend or apply to a civil action against an employee of the Government . . . which is brought for a violation of the Constitution of the United States," effectively removed Bivens actions from the purview of the FTCA and therefore the judgment bar does not apply to Bivens actions.

The Court agrees that the FTCA is no longer the exclusive remedy available to a plaintiff and that in fact a plaintiff may maintain a cause of action for both her Bivens claim and her FTCA claim.[4] In *Carlson v. Green*, the Supreme Court held that the FTCA was not the exclusive remedy for the intentional torts of federal law

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[4] As the Court noted at the time that it upheld the application of the judgment bar, practical considerations may weigh in a plaintiff's decision as to whether to bring an action pursuant to the FTCA or Bivens, or both. An FTCA suit is non-jury and attorney's fees are limited to twenty-five percent (25%), but collection of the judgment is certain. A Bivens action, on the other hand, entitles a plaintiff to a jury trial and attorney's fees are not capped. However, collection of the judgment against individual federal employees is not as certain.

enforcement officers, stating that "victims of the kind of intentional wrongdoing alleged in the complaint shall have an action under FTCA against the United States as well as a Bivens action against the individual officers alleged to have infringed their constitutional rights." 446 U.S. 14, 20 (1980). *Carlson* relied on the fact that Congress views FTCA and Bivens as parallel, complementary causes of action.

The purpose of the Westfall Act, upon which Plaintiff relies, was to protect federal employees from the potential liability to which they were exposed as a result of the decision in *Westfall v. Erwin*, 484 U.S. 292 (1988). Prior to *Westfall v. Erwin*, federal employees were absolutely immune from personal liability for common law torts so long as they were acting within the scope of their employment at the time the injury occurred. *Westfall v. Erwin* decided that federal employees must have been acting within the scope of their employment and, in addition, must have been acting in the exercise of governmental discretion. 484 U.S. at 297-98. Congress responded to this erosion in government employee immunity with the Westfall Act.

The Westfall Act expanded the Federal Torts Claims Act to provide more protection for employees acting within the scope of their employment. Section 5 of the Westfall Act provides that an action against the United States is the exclusive remedy for injuries arising from "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 2679(b)(1).

The Westfall Act also provided exceptions to a government employee's immunity from suit, including when an injured plaintiff brings a Bivens action seeking dam-

ages for a constitutional violation by a government employee. *See* § 2679(b)(2); *United States v. Smith*, 499 U.S. 160, 167 (1991).

Plaintiff's reliance, however, on the Westfall Act and *Carlson v. Green* as evidence that Congress did not intend the FTCA's judgment bar to apply to a Bivens action is misplaced. First, *Carlson*, unlike the case at bar did not involve a lawsuit brought as both an FTCA and a Bivens action. Thus, the Court did not address the question of whether a plaintiff could pursue both causes of action simultaneously or whether § 2676's judgment bar would apply should the plaintiff choose to do so. Second, with Section 5 of the Westfall Act, Congress made explicit that victims of constitutional violations would remain free to pursue a remedy against the individual employee if they chose to do so. *United States v. Smith*, 499 U. S. 160, 182 (1991). The Act, however, merely allowed for the two actions to proceed, where without the exception the only remedy that would be available to a plaintiff would be an FTCA action against the United States. While the Westfall Act amended the restrictions of bringing an action, it did not, either explicitly or implicitly, eviscerate the judgment bar that is contained in an entirely different section of the FTCA.

Moreover, Plaintiff's argument is not supported by case law. Plaintiff cites to cases that reaffirm a plaintiffs right to bring both an FTCA and Bivens action. However, not one of the cases to which Plaintiff cites deals with the application of the § 2676 judgment bar to a Bivens action in the event of an FTCA judgment. Yet such case law does exist, albeit not in this Circuit, in which courts have barred a subsequent Bivens action pursuant to the § 2676 judgment bar.

II. EXISTING CASE LAW INVOLVING THE JUDGMENT BAR[5]

In *Freeze v. United States of America, et al.*, 343 F. Supp. 2d 477 (M.D.N.C. 2004) *aff'd* 2005 U.S. App. LEXIS 9498 (4th Cir. May 24, 2005), the plaintiff asserted a claim for constitutional violations against individual defendants as well as an FTCA claim against the United States. The Court dismissed the plaintiff's FTCA claim because the plaintiff had not exhausted his administrative remedies. *Id.* at 481.

The Court additionally found, that judgment entered on the plaintiffs FTCA action prevented the plaintiff from asserting an action against the individual defendants based on a constitutional claim. *Id.* The Court held that the 28 U.S.C. § 2676 judgment bar applies to the constitutional claims against Federal employees based on the same conduct, regardless of the outcome of the underlying FTCA action. *Id.* (citing *Hoosier Bancorp of Indiana, Inc. v. Rasmussen*, 90 F.3d 180, 184-85 (7th Cir. 1996) ("There is no indication that Congress intended Section 2676 to apply only to favorable FTCA judgments."); *Gasho v. United States*, 39 F.3d 1420, 1437 (9th Cir. 1994) ("'any FTCA judgment, regardless of its outcome, bars a subsequent Bivens action on the same conduct that was at issue in the prior judgment' ").

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[5] Recently, in *Will v. Hallock*, 387 F.3d 147 (2nd Cir. 2004), the Supreme Court granted certiorari on a judgment bar issue. *Will v. Hallock*, ___ S. Ct. ___, 2005 WL 770286 (U.S. June 6, 2005) (No. 04-1332). One of the questions granted for review concerns whether dismissal of the FTCA case on jurisdictional grounds, would preclude a subsequent *Bivens* suit.

In *Serra v. Pichardo*, 786 F.2d 237 (6th Cir. 1986), the plaintiff sued the United States under the FTCA and brought a simultaneous Bivens action against the individual defendants, a prison warden and doctor. *Id.* at 238. The plaintiff obtained a judgment against the United States in the FTCA action and the prison doctor in the Bivens action. *Id.* The prison doctor appealed, arguing that the plaintiff's Bivens action was barred by § 2676. *Id.*

The Court held that § 2676 states that a judgment against the United States shall constitute a "complete" bar to "any" action by the claimant against the employee whose act or omission gave rise to the claim. *Id.* at 239. The court reasoned that the only limitation on the scope of this bar is that the actions must arise "by reason of the same subject matter." *Id.* Thus, the court stated, its decision depended on whether "by reason of the same subject matter" means (a) "on the same claim" or (b) "arising out of the same actions, transactions, or occurrences." *Id.*

In evaluating the meaning of "by reason of the same subject matter," the court looked to the language found in another section of the FTCA, 28 U.S.C. § 2672, dealing with the consequences of accepting a settlement from the government. *Id.* at 239.

> The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

Id. at 239 (citing 28 U.S.C. § 2672).

The court found that because 28 U.S.C. § 2672 mandates that the acceptance of a settlement constitutes a complete release of "any" claim against the employee (or the United States) by reason of the same subject matter, it is clear that the words "by reason of the same subject matter" were not intended to limit the scope of the release to the very claim that was settled. *Id.* at 240. The court concluded that the phrase "by reason of the same subject matter" in § 2676 should be given the same interpretation. *Id.* at 240. The court held that because the Bivens claim arose from the same actions that defined the FTCA claim, the Bivens action was barred. *Id.* at 241.

The plaintiff, in *Serra* argued that the Court's decision in *Carlson v. Green*, 446 U.S. 14 (1980), supported his argument that § 2676 only bars actions brought on the same claim that the plaintiff asserted against the government. *Id.* at 241. The *Serra* court held that the *Carlson* Courts imply found that a Bivens remedy is available to a plaintiff even though plaintiffs allegations also support a suit against the United States under the FTCA, whereas, the case before the *Serra* court dealt with the effect of an FTCA judgment on a plaintiffs power to continue to pursue a Bivens remedy. *Id.* The Court in *Carlson* did not address this issue. *Id.*

Finally, the *Serra* court held that it was inconsequential that the claims were tried together in the same suit and that the judgments were entered simultaneously. *Id.* (citing *Aetna Cas. & Sur. Co. v. United States*, 570 F.2d 1197, 1201 (4th Cir. 1978) ("a judgment against the United States would automatically bar the entry of any contemporaneous or subsequent judgment against [the

government employees]"); *Gilman v. United States*, 206 F.2d 846, 848 (9th Cir. 1953) ("the moment judgment was entered against the Government, then by virtue of § 2676 . . . the employee was no longer primarily answerable to the claimant,—he was no longer answerable at all") (footnote omitted), aff'd, 347 U.S. 507 (1954); *United States v. Lushbough*, 200 F.2d 717, 721 (8th Cir. 1952) ("The District Court, having awarded a judgment in favor of [plaintiff] in his action against the United States, could not in the face of the explicit provisions of the Act [section 2676] order judgment against [the government employee] in favor of [plaintiff] in the same action.")). Accordingly, the court held that plaintiffs judgment against the United States barred his action against the individual defendants. *Id.* at 242.

In *Hoosier v. Rasmussen*, the plaintiff brought an FTCA action against the United States. 90 F.3d 180, 182 (7th Cir. 1996). A few weeks later the plaintiff filed a Bivens action against the individual defendants for constitutional violations. *Id.* The district court entered judgment against the plaintiff in the FTCA action. *Id.* at 182-183. The district court subsequently dismissed the Bivens action as time barred and alternatively because it was precluded by the FTCA judgment. *Id.* at 184.

Interpreting the word "judgment" as applying to both judgments for and against the government, the district court held that the plaintiff's Bivens action was barred by the § 2676 judgment bar. *Id.* On appeal, the plaintiff argued that the judgment bar was inapplicable because the plaintiff recovered nothing on its FTCA action and the purpose of the judgment bar is to prevent dual recovery. *Id.*

The court, adopting the Ninth Circuit's reasoning in *Gasho v. United States*, 39 F.3d 1420, 1437 (9th Cir. 1994) held that there is no indication that Congress intended § 2676 to apply solely to FTCA judgments against the United States. *Id.* at 185. The *Hoosier* court joined the *Gasho* court's conclusion that "any FTCA judgment, regardless of its outcome, bars a subsequent Bivens action on the same conduct that was at issue in the prior judgment." *Hoosier*, 90 F.3d at 185 (quoting *Gasho*, 39 F.3d at 1437, 1438. (holding that the language of Section 2676 was neither "ambiguous" nor "vague," and suggested no distinction between judgments favorable and judgments unfavorable to the government")).

In *Clifton v. Miller, et al.*, 1998 U.S. App. LEXIS 2794 (7th Cir. February 9, 1998) (unpublished opinion) the plaintiff simultaneously brought an FTCA claim against the United States and a Bivens claim against the individual Defendants. *Id.* at *1. The plaintiff prevailed against the United States on his FTCA claim and against the individual defendants on his Bivens claim. *Id.* Following trial, the district court barred the Bivens judgment against the individual defendants pursuant to 28 U.S.C. § 2676. The plaintiff appealed.

Upon review, the court of appeals affirmed and held that because § 2676 operates as a "complete" bar to "any" action, it is inconsequential that the [Bivens and FTCA] claims were tried together in the same suit and that the judgments were entered simultaneously. *Clifton*, at *6 (citing *Serra v. Pichardo*, 786 F.2d 237, 241 (6th Cir. 1986)); *Ting v. United States*, 927 F.2d 1504, 1513 n.10 (9th Cir. 1991) ("[A] plaintiff may maintain both an FTCA and a Bivens action, [but] he may not

receive double recovery"); *Hoosier Bancorp of Indiana, Inc. v. Rasmussen*, 90 F.3d 180, 185 (7th Cir. 1996) (holding that "any FTCA judgment, regardless of its outcome, bars a subsequent Bivens action on the same conduct that was at issue in the prior judgment.")).

In *Arevalo v. Woods*, 811 F.2d 487 (9th Cir. 1987) the plaintiff filed an FTCA action against the United States and a Bivens action against the individual defendant. *Id.* at 488. After a bench trial the court entered judgment against the United States and against the individual defendant. *Id.* The court, adopting the Sixth Circuit's reasoning in *Serra v. Pichardo*, 786 F.2d 237 (6th Cir. 1986) held that the Bivens action against the individual defendant was barred by the FTCA judgment entered against the United States.

The Court noted that unlike *Carlson v. Green*, in the case before the court the plaintiff sued both the United States under the FTCA and the individual federal officer under Bivens and obtained judgments against both. *Arevalo*, 811 F.2d 487 at 490. Moreover, the judgment against the government in the FTCA action was based upon the same conduct which gave rise to the Bivens action against the individual defendant. *Id.* The court held that under these circumstances, the mandate of § 2676 is clear. *Id.* The FTCA judgment bars the plaintiffs Bivens action against the individual defendant. *Id.* (citing 28 U.S.C. § 2676; *Serra v. Pichardo*, 786 F.2d 237 (6th Cir. 1986)).

The court noted that while the plaintiff might prefer the judgment against the individual defendant rather than the judgment against the government, it is too late for that choice. *Arevalo*, 811 F.2d at 490. The moment judgment was entered against the government, by virtue

of § 2676, the individual defendant was no longer answerable to the plaintiff for damages. *Id.* (citing *Serra*, 786 F.2d at 141; *Gilman v. United States*, 206 F.2d 846, 848 (9th Cir. 1953), affd, 347 U.S. 507 (1984); *Aetna Casualty and Surety Company v. United States*, 570 F.2d 1197, 1201 (4th Cir. 1978)).

In *Kreines v. United States*, 959 F.2d 834 (9th Cir. 1992) the Bivens claim was tried to the jury while the FTCA claim was tried to the court. *Id.* at 836. The jury found against the individual defendants on the Bivens claim and the court entered judgment for the United States on the FTCA claim. *Id.* The individual defendants filed a motion to vacate the judgment against them based on the judgment entered in the FTCA claim. *Id.* The court denied the motion and the defendants appealed. *Id.*

The question presented on appeal was whether § 2676 applies when the judgment on the FTCA claim (a) has become final contemporaneously with the judgment on a Bivens claim arising from the "same subject matter" and (b) has been favorable to the government. *Id.*

The court stated that although the language of the statute refers to a bar of "any action," it fails to resolve whether the bar applies to other claims raised in the same action. *Id.* The court found that Congress' primary concern in enacting the bar was to prevent multiple lawsuits on the same facts. *Id.* (citing Hearings Before the House Committee on the Judiciary on H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess. 9 (1942) (statement of Francis Shea, Assistant Attorney General)). The court held that this concern is absent when suit is brought contemporaneously for FTCA and other relief. *Id.* at 838.

The court further distinguished between judgments favorable and judgments unfavorable to the government. The court held that the text of the statute "is ambiguous on the question of whether an FTCA judgment favorable to the government bars a contemporaneous Bivens judgment." *Id.* at 838. Thus, the court found that "it was free, in this narrow context, to consider the possibility that the quality of the FTCA judgment may have a bearing on its effect on contemporaneous judgments." *Id.* at 838.

In resolving this ambiguity, the court noted that the statutory bar was conceived by Congress primarily to prevent dual recoveries arising from additional, subsequent litigation. *Id.* at 838. The court found that there was no threat of dual recovery here because the plaintiff did not prevail on her FTCA claim and concluded that § 2676 does not preclude Bivens relief in this case. *Id.*

In *Gasho v. United States*, 39 F.3d 1420 (9th Cir. 1994) the plaintiffs filed an FTCA action against the United States which was dismissed. The plaintiffs then filed a Bivens action against the individual defendants. *Id.* at 1425. The district court, reading the word "judgment"in § 2676 as applying to both judgments for and against the government, dismissed the Bivens action. *Id.* at 1436.

On appeal the plaintiff argued that the word judgment is vague and ambiguous about whether it applies to both judgments for and against the United States. *Id.* at 1437. The court disagreed. Looking at the plain language of the statute, the court held that the statute speaks of "judgment" and suggests no distinction between judgments favorable and judgments unfavorable to the government. *Id.* at 1437. The court held that the

language is not "ambiguous" or "vague." *Id.* (citing *Leaman v. Ohio Dept. of Mental Retardation*, 825 F.2d 946 (6th Cir. 1987) (interpreting Ohio Court of Claims Act and stating in dictum that similar provision in section 2676 provides that "even adverse judgments" in favor of the government bar subsequent recovery against employees)).

The court noted that in enacting this legislation, Congress was concerned with the prevention of dual recoveries and the prevention of multiple lawsuits. *Id.* at 1437 (citing Hearings on H.R. 5373 and H.R. 6463). The court held that the risk of dual recovery was absent because Plaintiff did not prevail in its FTCA action. *Id.* at 1437. The court further noted that Congress was concerned about the government's ability to defend subsequent suits against its employees. *Id.* The court found that Congress never intended to draw a distinction based on whether the government prevailed. *Id.* The court therefore held that any FTCA judgment, regardless of its outcome, bars a subsequent Bivens action on the same conduct that was at issue in the prior judgment. *Id.*

The court further explained that its interpretation of § 2676 serves the interests of judicial economy. "Plaintiffs contemplating both a Bivens claim and an FTCA claim will be encouraged to pursue their claims concurrently in the same action, instead of in separate actions. This will foster more efficient settlement of claims, since the evidence and proof in FTCA and Bivens claims often overlap." *Id.* at 1438.

In *Engle v. Mecke*, 24 F.3d 133 (10th Cir. 1994) the plaintiff sued the United States in an FTCA action and simultaneously sued the individual defendant in a Bivens

action. *Id.* at 134. The district court bifurcated the trial with the Bivens action submitted to the jury and the FTCA claims were retained by the court. *Id.* The jury awarded the plaintiff $351,646 against the individual defendant. *Id.* Based on the same evidence the district court awarded the plaintiff $28,300 in damages. *Id.* The court then vacated the jury's verdict and award on the ground that the FTCA judgment constituted a complete bar to the action against the individual defendant. *Id.*

On appeal, the Court of Appeals affirmed and explained the effect that a final judgment in an FTCA case has on a Bivens action based on the same underlying conduct.

> When a federal law enforcement officer commits an intentional tort, the victim has two avenues of redress: 1) he may bring a Bivens claim against the individual officer based on the constitutional violation, or 2) he may bring a common law tort action against the United States pursuant to the FTCA. These are separate and distinct causes of action arising out of the same transaction. A decision to sue the government, however, affects the availability of a Bivens action against the federal officer. Although the plaintiff may elect initially to bring his action against either defendant, a judgment against the United States under the FTCA constitutes "a complete bar to any action by the claimant, by reason of the same subject matter, against the employee . . . whose act or omission gave rise to the claim." 28 U.S.C. § 2676.

Engle, 24 F.3d at 135 (citations omitted) (ellipses in original).

In explaining why the judgment bar does not effectively deny a plaintiff his Seventh Amendment right to a jury trial, the court explained that

> [Plaintiff] had two separate and distinct causes of actions against two separate and distinct defendants. Had he chosen to seek his redress from the individual law enforcement officer, the jury verdict would have been given full effect and his Seventh Amendment rights would have been preserved. Because, however, he chose to seek redress from the United States government, he had no right to a jury's verdict. The United States, as sovereign, is completely immune from suit unless it consents to be sued. *United States v. Sherwood*, 312 U.S. 584, 586 (1941). It may, therefore, condition its consent on dispensation of a jury trial without offending the Seventh Amendment. *See id.* at 587. As [Plaintiff] had no Seventh Amendment right to a jury trial, the district court did not err in making independent factual findings instead of accepting the jury's award.

Engle, 24 F.3d at 135.

In *Farmer v. Perrill*, 275 F.3d 958 (10th Cir. 2001) the court held that because the plaintiff obtained an adverse judgment in her FTCA action based on the same alleged conduct, the Bivens action was barred by § 2676. *Id.* at 960. The plaintiff filed a Bivens action against various prison employees. *Id.* The district court denied the defendants motion for summary judgment in the Bivens action. *Id.* During the pendency of this lawsuit, judgment was entered in a separate lawsuit brought by the plaintiff against the United States pursuant to the FTCA seeking damages arising out of the same subject matter as the Bivens action. *Id.* The FTCA action was

dismissed with prejudice by the district court for failure to prosecute. *Id.* at 961. Subsequently, the defendants in the Bivens action moved for reconsideration of the order denying their motion for summary judgment arguing that § 2676 barred the Bivens action after judgment has been entered in the FTCA action. *Id.* The district court denied the defendants' motion for reconsideration and the defendants appealed. *Id.*

The court of appeals reversed and held that by its terms the judgment bar in § 2676 precludes plaintiffs from bringing a Bivens action regarding the same subject matter regardless of whether the final FTCA judgment is rendered in favor of a plaintiff or the government. *Id.* at 963. The court found that the phrase "by reason of the same subject matter" in § 2676 means" arising out of the same actions, transactions, or occurrences." *Id.* at 961 (citing *Serra v. Pichardo*, 786 F.2d 237, 239-40 (6th Cir. 1986)).

In *Trentadue v. United States*, 397 F.3d 840 (10th Cir. 2005) the individual defendants argued that the district court's entry of judgment on the plaintiff's FTCA claims required the court to vacate the judgment entered against him on the Bivens claims. The court of appeals agreed. *Id.* at 858-859.

The district court tried the plaintiff's FTCA and Bivens claims contemporaneously in a bifurcated proceeding. *Id.* at 858. The jury found the individual defendant liable for constitutional violations under Bivens. *Id.* The Court entered judgment on the Bivens claims before adjudicating the FTCA claim that was before it on a bench trial. *Id.*

In deciding whether the FTCA judgment bar applies to FTCA and Bivens actions brought simultaneously, the

Court noted that the plaintiffs' FTCA and the Bivens action arose out of the same "actions, transactions, or occurrences" for the purposes of § 2676. *Id.* at 858. The court found that the FTCA's judgment bar constitutes "a complete bar to any action" based on the same subject matter as the claimant's FTCA case. *Id.* (citing 28 U.S.C. § 2676). The court held that although the language of the statute does not speak to situations where FTCA and non-FTCA claims are tried together in the same action, § 2676 nevertheless applies. *Id.* at 859 (citing *Kreines v. United States*, 959 F.2d 834, 838 (9th Cir. 1992)). The court held that "contrary rule would permit plaintiffs to escape the judgment bar's preclusive effect in cases like this, where the district court waited to enter judgment on FTCA claims tried contemporaneously with Bivens claims. Such is not the intent of the rule." *Trentadue*, 397 F.3d at 858-859 (citing *Farmer*, 275 F.3d at 963 n.7 (Congress intended to prevent multiple lawsuits as well as multiple recoveries) (in turn citing *Hoosier Bancorp of Ind. v. Rasmussen*, 90 F.3d 180, 184 (7th Cir. 1996), and *Gasho v. United States*, 39 F.3d 1420, 1437 (9th Cir. 1994))). The court further held that the fact that the district court entered judgment on the Bivens claims before issuing its order and judgment in the FTCA case is inconsequential under § 2676.

The court reiterated that the bar precludes a Bivens action regardless of whether the final FTCA judgment is rendered in favor of the plaintiff or the government. The only limiting factor on the bar is that the claims must have arisen "by reason of the same subject matter." The Court thus concluded that a final judgment in the FTCA action will bar the Bivens action against the individual defendant. Thus, upon entry of a final judgment in the FTCA action, the district court was directed

to dismiss the Bivens action against the individual defendants. *Trentadue*, 397 F.3d at 859.

III. THE INSTANT CASE

It is well established that "when the statute' s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000) (internal quotation marks omitted) (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241(1989) (in turn quoting *Caminetti v. United States*, 242 U.S. 470, 485(1917))). So we begin with the present statute as issue.

> The judgment in an action under section 1346(b) of this title [27 USCS § 1346(b)] shall constitute a complete bar to any action by the claimant by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

28 U.S.C. § 2676.

In looking first to the language of this statute, this Court must answer two separate questions as to the judgment bar's application to the instant case. First, is the judgment bar applicable where judgment was entered in favor of the United States in the FTCA action? Second, is the judgment bar applicable where the Bivens and FTCA actions have been brought simultaneously?

There is no ambiguity as to whether the statute applies where the United States has prevailed on the FTCA claim. The language of the statute is plain. It bars any subsequent action where "[t]he judgment" has

been entered on the FTCA claim. The only limiting language in the statute is that the claims must have arisen "by reason of the same subject matter." In this case, the FTCA and Bivens actions "arose out of the same actions, transactions, or occurrences." Therefore, any judgment entered in the FTCA claim invokes the preclusive effect of the § 2676 judgment bar as to the Bivens action. *See Trentadue v. United States*, 397 F.3d 840 (10th Cir. 2005); *Farmer v. Perrill*, 275 F.3d 958 (10th Cir. 2001); *Hoosier Bancorp of Indiana, Inc. v. Rasmussen*, 90 F.3d 180, 184-85 (7th Cir. 1996); *Gasho v. United States*, 39 F.3d 1420, 1437 (9th Cir. 1994) ("Because we have affirmed the district court's judgment in favor of the United States in the FTCA claims involving seizure of the aircraft, that prior judgment precludes any subsequent Bivens claim based on the seizures"); *Serra v. Pichardo*, 786 F.2d 237 (6th Cir. 1986); *Freeze v. United States of America, et al.*, 343 F. Supp. 2d 477 (M.D.N.C. 2004) aff'd 2005 U.S. App. LEXIS 9498 (4th Cir. May 24, 2005); *but see Kreines v. United States*, 959 F.2d 834 (9th Cir. 1992).

This Court similarly finds that § 2676 bars a simultaneous Bivens action after judgment has been entered on the FTCA action. The plain language of § 2676 states that § 2676 is a bar to any action by the claimant regardless of whether they are brought simultaneously in one action. The statute does not make these distinctions and thus neither does this Court. The only distinction that the statute does make is that the actions must have arisen "by reason of the same subject matter." *Serra v. Pichardo*, 786 F.2d at 239-240. 28 U.S.C. § 2676 constitutes a "complete bar to any action" based on the same subject matter as Plaintiff's FTCA case. Although the language of the statute does not speak to situations

where FTCA and non-FTCA claims are tried together in the same action, by its plain language § 2676 nevertheless applies. *Trentadue*, 397 F.3d at 859 (holding that § 2676 constitutes a "complete bar to any action" based on the same subject matter as the claimant's FTCA case, even when tried simultaneously); *Clifton v. Miller, et al.*, 1998 U.S. App. LEXIS 2794 (7th Cir. February 9, 1998) (unpublished opinion) (finding it inconsequential that the FTCA and Bivens claims were tried in the same suit); *Engle v. Mecke*, 24 F.3d 133 (10th Cir. 1994) (same); *Serra v. Pichardo*, 786 F.2d 237 (6th Cir. 1986) (same) *but see Kreines v. United States*, 959 F.2d 834 (9th Cir. 1992); *Gasho v. United States*, 39 F.3d 1420, 1437 (9th Cir. 1994). A contrary rule would permit plaintiff to escape from the judgment bar's preclusive effects—"[s]uch is not the intent of the rule." *Trentadue*, 397 F. 3d at 858-859.

V. CONCLUSION

Accordingly, based on the foregoing it is

ORDERED AND ADJUDGED that Plaintiff's Bivens action is DISMISSED as barred by 28 U.S.C. § 2676. The individual Defendants shall move for final judgment within ten (10) days from the date of this Order. This case is CLOSED.[6]

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[6] By separate Order the Court will address the individual Defendants' qualified immunity.

DONE AND ORDERED in Chambers at Miami, Florida, this 22nd day of August, 2005.

/s/ K. MICHAEL MOORE
K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

cc: All counsel of record

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 98-7256-CIV-MOORE

JANNERAL DENSON AND JORDAN L. TAYLOR, A MINOR, THROUGH HIS LEGAL GUARDIAN, JANNERAL DENSON, PLAINTIFF(S)

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANT(S)

[Filed: Oct. 4, 2005]

THIS CAUSE comes before the Court after a four-day trial in Miami, Florida, from April 18, 2005, through April 21, 2005. Plaintiffs filed an action against the United States of America and against United States Customs Inspectors Cheryl Friedland and Lee Levanka (the "individual Defendants").[1] From the United States Plaintiff sought damages under the Federal Torts Claims Act ("FTCA") for circumstances surrounding her detention by United States Customs officials at the Ft. Lauderdale International Airport on February 14, 1997. From the individual Defendants Plaintiff sought damages under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), for violations of her consti-

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[1] Plaintiff voluntarily dismissed Senior Inspector Flynn following his direct trial testimony. Tr. Flynn, April 19 at 188.

tutional rights arising out of the same facts. The FTCA action was tried to the bench while simultaneously the Bivens action was tried to a jury.

The Court, having heard four days of trial testimony, having reviewed the applicable pleadings, received evidence, and reviewed the applicable law found against Plaintiff and in favor of the United States in the Federal Tort Claims Act action.

Subsequently, the individual Defendants argued that because this Court had entered judgment on Plaintiff's FTCA action, Plaintiff's Bivens action was precluded by 28 U.S.C. § 2676. This Court agreed and dismissed the Bivens action. Alternatively, this Court found that if the § 2676 judgment bar does not apply, the individual Defendants were nevertheless entitled to qualified immunity. The Court enters the following Order to that effect.[2]

FACTUAL BACKGROUND

Plaintiff Janneral Denson is an American citizen residing in Boyton Beach, Florida. Tr. Denson, April 21 at 129. On February 14, 1997, Plaintiff Janneral Denson, who was approximately six months pregnant, arrived at the Fort Lauderdale International Airport following a brief trip to Jamaica. Tr. Friedland, April 18 at 59; Pl. Trial Ex. 1; Tr. Denson, April 21 at 146-148; Tr. Denson, April 21 at 165. Plaintiff traveled from Miami to Jamaica on the evening of Wednesday, February 12, 1997

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[2] In light of the Court's August 22, 2005 ruling on the applicability of the § 2676 judgment bar, this ruling sets forth the alternative underlying legal rationale for dismissal of the *Bivens* action and the individual Defendants' entitlement to qualified immunity.

and returned on an unscheduled Air Jamaica flight to the Fort Lauderdale airport on the afternoon of Friday, February 14, 1997. Tr. Friedland, April 18 at 59-61; Pl. Trial Ex. 1; Tr. Denson, April 21 at 146-148. The total length of Plaintiff's trip was approximately one full day. Tr. Friedland, April 19 at 96; Pl. Trial Ex. 1. Jamaica is known to Customs inspectors as a source country for smuggling narcotics into the United States. Tr. Friedland, April 18 at 62; Tr. Smith, April 20 at 102, 129; Tr. Fortin, April 21 at 16; Tr. Cappuccio, April 21 at 32-33. South Florida is considered an entry point into the United States for narcotics from source countries. Tr. Fortin, April 21, at 16. When there is a flight arriving from a source country, United States Customs inspectors are on high alert. Tr. Flynn, April 19 at 145; Tr. Fortin, April 21 at 14-20; Tr. Friedland, April 19 at 88, 96, 106; Tr. Cappuccio, April 21 at 32. Plaintiff entered the United States with no luggage and carried only a purse and a small to medium sized bag. Tr. Denson, April 21 at 141, 142, 148. Plaintiff passed through the primary customs inspection without incident. Tr. Denson, April 21 at 148-149. Subsequently, Senior Inspector Friedland ("SI Friedland"), who was posted at a secondary Customs station, observed Plaintiff exiting the Customs area and avoiding eye contact. Tr. Friedland, April 18 at 71; Tr. Friedland, April 19 at 88-89. SI Friedland further noted that Plaintiff was pregnant and was traveling with no luggage. *Id.* United States Customs inspectors were aware of a smuggling trend in which pregnant women were recruited as drug couriers because they were less likely to be detected by United States Customs as drug couriers. Tr. Friedland, April 19 at 106-107; Tr. Lavenka, April 20 at 71; Tr. Cappuccio, April 21 at 37; Tr. Smith, April 20 at 132-133; Tr. Fortin,

April 21 at 19-20. Furthermore, Customs is unable to x-ray a pregnant women to determine if they are internal narcotics couriers. *Id.*

SI Friedland called out to Plaintiff. Tr. Friedland, April 18 at 71; Tr. Friedland, April 19 at 90. SI Friedland quickly moved toward Plaintiff. Tr. Friedland, April 19 at 90. When SI Friedland caught up with Plaintiff, she escorted Plaintiff to the secondary belt for questioning. Tr. Friedland, April 19 at 60, 91.[3] SI Friedland began asking Plaintiff routine Customs questions. Tr. Friedland, April 18 at 71. When asked about the purpose of her trip, Plaintiff stated that she went to see her husband, Richard Scott, in Jamaica. Tr. Friedland, April 19 at 94; Tr. Denson, April 21 at 152. At trial Plaintiff further explained that she went to see her husband because they had an appointment with Jamaican immigration officials to obtain a visa for him to come to the United States. Tr. Denson, April 21 at 152. SI Friedland testified that she could not recall if Plaintiff had told her that she was having a meeting with Jamaican authorities to obtain a visa for Richard Scott. Tr. Friedland, April 19 at 39. Plaintiff initially could not tell SI Friedland where Plaintiff's husband lived. Tr. Friedland, April 18 at 77; Tr. Friedland, April 19 at 94. Plaintiff later stated that her husband lived in a parish in Jamaica. Tr. Friedland, April 19 at 95.

SI Friedland asked Plaintiff how she contacted her husband. Tr. Friedland, April 18 at 77; Tr. Friedland, April 19 at 95. Plaintiff replied that she contacted her husband by telephone, but she could not give SI Fried-

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[3] At some point during this phase of the investigation, Plaintiff was escorted into the search room. It is unclear to this Court exactly when that change in location occurred.

land her husband's telephone number. *Id.* Plaintiff had in her possession a "marriage register" of the marriage between Plaintiff and Richard Scott. Tr. Friedland, April 19 at 52. SI Friedland asked Plaintiff how she got her airplane ticket to Jamaica and who paid for her ticket. Tr. Friedland, April 19 at 95; Tr. Denson, April 21 at 152. After some hesitation, Plaintiff told SI Friedland that a man named Osmond purchased the airplane ticket to Jamaica. Tr. Friedland, April 19 at 95. However, Plaintiff did not know "Osmond's" last name. *Id.* Plaintiff further stated that she reimbursed Osmond for the ticket with money from her income tax refund and showed SI Friedland an H&R Block check stub. Tr. Denson, April 21 at 153. SI Friedland noted that Plaintiff's ticket was purchased only four (4) days prior to her trip. Tr. Friedland, April 19 at 95.

When SI Friedland questioned Plaintiff about her employment, Plaintiff stated that she worked for Office Depot. Tr. Friedland, April 19 at 98; Tr. Denson, April 21 at 153. SI Friedland requested the telephone number of Plaintiff's employer. Tr. Friedland, April 18 at 78; Tr. Friedland, April 19 at 98. When SI Friedland attempted to confirm Plaintiff's employment by calling the number provided by Plaintiff, SI Friedland found that the number had been disconnected. Tr. Friedland, April 18 at 78; Tr. Friedland, April 19 at 98. SI Friedland asked Plaintiff how much money she was carrying. Tr. Friedland, April 19 at 98. Plaintiff had in her possession two $100 dollar bills and various other bills. Tr. Friedland, April 19 at 98. Plaintiff traveled with an affidavit of citizenship, rather than a passport or other form of travel identification. Pl. Trial. Ex. 42MM; Tr. Denson, April 21 at 145-146. Plaintiff was carrying a tablet of

paper that contained the following handwritten information about her husband:

> RICHARD SCOTT—POULTRY FARMER SINCE 1994
>
> LIVES @ Belfast NEAR MORANT BAY IN THE PARISH OF SAINT THOMAS.
>
> HIS BIRTHDAY IS: FEB. 17TH (BORN 1972)
>
> How you met.
>
> DEC. 1995 A FRIEND INVITED YOU TO JAMAICA WHILE THERE WENT TO THE BEACH DUNNS RIVER MET HIM THERE.
>
> DEC. 1996 HE VISITED YOU AT YOUR FRIENDS SAINT ANN HOME YOU INVITED HIM AT HIS SAINT THOMAS HOME *YOU HAD NO PRIOR KNOWLEDGE OF HIM YOU RETURNED HOME TO FLORIDA—TELEPHONE EXCHANGE
>
> * ALWAYS USED CALLING CARDS—PRICE REASONS
>
> MARCH 1996 YOU WENT DOWN TO VISIT HIM IN JAMAICA.
>
> OCT. 1996 YOU WENT BACK TO MARRY HIM
>
> * HIS PHONE WRITTEN DOWN at HOME 809 Something
>
> You are not good with remembering Numbers.
>
> *NOT HIS PHONE ANYWAY Neighbors' Phone.

> ANY OTHER Questions Just answer something in that case try to remember what you were asked and what you answered.
>
> * DOES HE HAVE RELATIVE OR FRIENDS IN U.S. THAT YOU KNOW OR KNOW OF— NO—

Pl. Trial Ex. 423B.

Initially Plaintiff told SI Friedland that she did not know who wrote the document. Tr. Friedland, April 19 at 37. Plaintiff later told SI Friedland that she wrote the information on the tablet but that she had seven different handwritings. Tr. Friedland, April 18 at 97; Tr. Friedland, April 19 at 36-37. As part of the inspection process, SI Friedland queried the Treasury Enforcement Communication System ("TECS II") computer data base for any information concerning Plaintiff.[4] Tr. Friedland, April 19 at 101-102.

The TECS lookout stated:

> REFER TO CUSTOMS FOR ENFORCEMENT EXAM. ACQUIRED TRAVEL DOCUMENTS SHORTLY BEFORE DEPARTURE. MATCHES HI RISK NARCO-TARGETING INDICATORS. (IF ARRIVING FROM SOURCE COUNTRY).

Pl. Trial Ex. 42-CC.

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[4] TECS is a computerized system that reveals persons who are entering the country who are on terrorist alert, outstanding warrants, probation violators, persons suspected of narcotics trafficking, money laundering and violations of other laws. Tr. Friedland, April 19 at 102; Tr. Flynn, April 19 at 148.

After further questioning by SI Friedland, Plaintiff stated that she was with a friend in Jamaica, but Plaintiff could not provide SI Friedland with this friend's last name. Tr. Friedland, April 19 at 106. In addition, Plaintiff stated that she traveled to Jamaica with her friend Shelita Jacobs (phonetic). SI Friedland believed that Plaintiff represented to her that Ms. Jacobs was traveling with Plaintiff on this trip. Tr. Friedland, April 18 at 79, 118. When SI Friedland was unable confirm that in fact Ms. Jacobs had been traveling with Plaintiff, SI Friedland believed that Plaintiff had made a false statement. Tr. Friedland, April 19 at 106. During the period of questioning at the secondary belt, Plaintiff exhibited signs of nervousness. Plaintiff held tightly to the examination belt to avoid shaking, avoided eye contact, and was breathing heavily. Tr. Friedland, April 18 at 75; Tr. Friedland, April 19 at 93, 97, 141-142.

Approximately fifteen (15) minutes after SI Friedland completed her questioning of Plaintiff, Plaintiff indicated that she needed to use the restroom. Tr. Friedland, April 19 at 110; Tr. Denson, April 21 at 156. SI Friedland conducted a pat down of Plaintiff prior to her using the restroom. Tr. Denson, April 21 at 157.[5] SI Friedland testified that she formed the pat down "within the standard operating procedure that [she had] been trained and consistent with the way you are supposed to do it." Tr. Friedland, April 19 at 110. This fact was not controverted at trial. This court thus assumes that this was a routine Terry-like pat down. The door was left open as Plaintiff used the restroom. Tr. Denson, April

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[5] At some point SI Friedland requested and received permission from Supervisor Flynn to perform the pat down of Plaintiff. Tr. Friedland, April 18 at 57.

21 at 157. After Plaintiff used the restroom, consistent with Customs procedures, SI Friedland inspected the toilet paper, the contents of the toilet, and Plaintiff's undergarments. Tr. Friedland, April 18 at 57-58; Tr. Friedland, April 19 at 110-111; Tr. Banks, April 21 at 88, 96; Tr. Denson, April 21 at 157-159.

Upon returning from the restroom Plaintiff was placed in handcuffs and her property was inventoried. Tr. Denson, April 21 at 160. SI Friedland then read Plaintiff her rights and asked Plaintiff to sign a waiver which Plaintiff refused to do. Tr. Friedland, April 18 at 80; Tr. Denson, April 21 at 161-162; Pl. Trial Ex. 42AA.

SI Friedland next sought and received supervisory approval from Acting Port Director Levanka to transport Plaintiff to Jackson Memorial Hospital ("JMH") as a suspected internal narcotics courier. Tr. Friedland, April 19 at 36, 58-60.[6] Approval for examination at Jackson Memorial Hospital was based on the totality of the facts and circumstances gathered by SI Friedland. Tr. Lavenka, April 19 at 192, 204, 206-8; Tr. Levanka, April 20 at 50. Plaintiff was then transported to Jackson Memorial Hospital for examination and treatment.[7] Tr. Friedland, April 19 at 112; Tr. Fortin, April 21 at 12, 14.

Upon arriving at Jackson Memorial Hospital Plaintiff was photographed and told to go into a room and change from her clothes into hospital clothes. Tr. Denson, April

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[6] Lee Lavenka was appointed by the Port Director to be the Acting Port Director from February 14 through February 16. Tr. Lavenka, April 19 at 190. He had been a supervisory customs inspector since 1991. Tr. Lavenka, April 20 at 76.

[7] Customs and Jackson Memorial Hospital have an arrangement whereby the Hospital provides medical services to patients suspected of smuggling contraband inside the body. Tr. Friedland, April 19 at 28.

21 at 163-164. Plaintiff was then taken to the Labor and Delivery section of the Hospital. Tr. Denson, April 21 at 165-166. Upon arriving at Labor and Delivery, Plaintiff was asked her name and date of birth by a Jackson Memorial Hospital employee and was asked to sign an unidentified form. *Id.* Plaintiff refused to sign this form, stating that she was not going to be responsible to pay any bill resulting from her stay. *Id.* Plaintiff was next taken into a small waiting room and asked to give a urine sample to verify her pregnancy. Tr. Denson, April 21 at 165-166. Plaintiff was then placed in a bed which was separated by curtains from other beds. Tr. Denson, April 21 at 166-167. Plaintiff's left hand was handcuffed to the bed. *Id.* In the presence of SI Friedland, Plaintiff was examined by a physician specializing in obstetrics. Tr. Friedland, April 19 at 31; Tr. Denson, April 21 at 170. The physician performed a pelvic examination and an obstetrical ultrasound examination. Tr. Denson, April 21 at 167-168. The pelvic examination was negative for drugs. Tr. Denson, April 21 at 170-171; Tr. Friedland, April 19 at 32. The obstetrical physical examination and ultrasound, however, did not rule out the possibility that Plaintiff was smuggling drugs in her digestive system. Tr. Levanka, April 19 at 234.

Because an x-ray exam during pregnancy is not permitted, Plaintiff was held for a monitored bowel movement. Tr. Friedland, April 19 at 63, 64, 118; Tr. Lavenka, April 20 at 74, 196. This process requires three separate drug-free stool samples in accordance with the standard established by the Jackson Memorial Hospital doctors and United States Customs. Tr. Friedland, April 19 at 27; Tr. Lavenka, April 19 at 196; Tr. Levanka, April 20 at 59. Plaintiff was taken back to Ward D for the monitored bowel movement. Tr. Denson, April

21 at 171. In Ward D Plaintiff was placed in a bed and one hand was handcuffed to the bed rail. Tr. Denson, April 21 at 171. Plaintiff was prescribed and provided the laxative Go-Lytely by the hospital staff. Tr. Friedland, April 19 at 26, 29-30, 120. Plaintiff testified that SI Friedland told her that she had to drink the Go-Lytely and pass three clear stools or she was not going to be able to leave. Tr. Denson, April 21 at 175. Plaintiff drank the Go-Lytely and had three bowel movements containing no packets of drugs. Pl. Trial Ex. 42 HH. The last drug free stool was passed on February 16, 1997 at 9:45 a.m. Pl. Trial Ex. 42 HH. Following the negative bowel movements, Plaintiff was informed that she was to be released, her handcuffs were removed and she was allowed to dress. Tr. Denson, April 21, at 181. Plaintiff was discharged on February 16, 1997 after no drugs were found in her digestive system. Tr. Lavenka, April 19 at 202; Tr. Friedland, April 19 at 27. Plaintiff was driven back to the Ft. Lauderdale airport, where Customs retrieved her property that had been held in a safe, and Plaintiff was allowed to continue on her travel. Tr. Friedland, April 19 at 117, 122; Tr. Denson, April 21 at 182-184.

DISCUSSION

I. Motion Pursuant to Rule 50(a)

At the close of Plaintiff's case in chief, the individual Defendants moved for judgment as a matter of law, pursuant to Rule 50(a)(1)(2) of the Federal Rules of Civil Procedure based on the defense of qualified immunity. Qualified immunity is a question of law for the Court to determine. *Ansley v. Heinrich*, 925 F.2d 1339, 1341

(11th Cir. 1991). This legal determination may be made by the court either before trial, during trial, or after trial." *Stone v. Peacock*, 968 F.2d 1163, 1165 (11th Cir. 1992).

Under Rule 50, the Court considers all evidence and inferences in the light most favorable to the non-moving party to determine whether the evidence presented is so one-sided that reasonable people could not arrive at a contrary verdict. *Lipphardt v. Durango Steakhouse of Brandon, Inc.*, 267 F.3d 1183, 1186 (11th Cir. 2001). "If there is substantial evidence opposed to the motion, such that reasonable people, in the exercise of impartial judgment, might reach differing conclusions," then the case is properly submitted to the jury. *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1230 (11th Cir. 2001).

Plaintiff contends that the denial of the individual Defendants' summary judgment motion on qualified immunity precludes a finding of qualified immunity in the individual Defendants' favor following trial. Plaintiff is mistaken. *See, e.g., Oladeinde v. City of Birmingham*, 230 F3d 1275, 1289 (11th Cir. 2000) (denial of qualified immunity affirmed by appellate court does not prevent finding qualified immunity following trial); *Shelkofsky v. Brouhgton*, 388 F.2d 977 (5th Cir. 1968) (reversal of summary judgment for a trial by jury would not preclude the district court from later entering summary judgment or judgment as a matter of law if the evidence offered at trial was insufficient to warrant submission to the jury); *see also Jackson v. Alabama State Tenure Commission*, 405 F.3d 1276, 1283 (11th Cir. 2005) (noting that "[w]hen the record changes, which is to say when the evidence and the inferences that may be drawn from it changes, the issues presented change as well.").

In *Johnson v. Breeden*, 280 F.3d 1308 (11th Cir. 2002), the Court, addressing this specific issue, noted that Defendants who are not successful with their qualified immunity defense before trial can re-assert it at the end of the plaintiff's case in a Rule 50(a) motion. *Id.* at 1317 (citing Fed. R. Civ. P. 50(a); *Cottrell v. Caldwell*, 85 F.3d 1480, 1488 (11th Cir. 1996)). The court noted that this type of motion will sometimes be denied because the same evidence that led to the denial of the summary judgment motion usually will be included in the evidence presented during the plaintiff's case, although sometimes evidence that is considered at the summary judgment stage may turn out not to be admissible at trial. *Id.* at 1317-1318 (citing *Wright v. Southland Corp.*, 187 F.3d 1287, 1304 n.21 (11th Cir. 1999); *McMillian v. Johnson*, 88 F.3d 1573, 1584-85 (11th Cir. 1996)). Where there is no change in the evidence, the same evidentiary dispute that got the plaintiff past a summary judgment motion asserting the qualified immunity defense will usually get that plaintiff past a Rule 50(a) motion asserting the defense, *although the district court is free to change its mind. Id.* at 1318 (emphasis added) (citing *Abel v. Dubberly*, 210 F.3d 1334 (11th Cir. 2000) (holding that "binding precedent in this Circuit expressly permits consideration of a Rule 50 motion after the denial of summary judgment") (citing in turn *Gross v. Southern Ry. Co.*, 446 F.2d 1057, 1060 (5th Cir. 1971) ("It is settled in this Circuit, therefore, that prior denial of summary judgment does not rule out the possibility of a subsequent directed verdict."); *Gleason v. Title Guarantee Co.*, 317 F.2d 56, 58 (5th Cir. 1963) ("Sound practical reasons . . . may justify a trial judge's denying summary judgment even on the identical evidence supporting his granting a directed verdict."); *Stanley v. Guy*

Scroggins Constr. Co., 297 F.2d 374, 378 (5th Cir. 1961) ("This holding [reversing a grant of summary judgment] does not rule out the possibility of a directed verdict. It may be, when the evidence is in, that the district judge will find that the case should be disposed of by a directed verdict. He is free to do so."); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1241-42, 1253 (11th Cir. 1999) (affirming the district court's granting of a Rule 50 motion following denial of a Rule 56 motion); *Walker v. NationsBank N.A.*, 53 F.3d 1548, 1552-53, 1558 (11th Cir. 1995) (affirming a grant of a Rule 50 motion after denial of a Rule 56 motion)).

Summary judgment is determined based on the facts available to the court at that stage in the proceeding. In sharp contrast, particularly in a qualified immunity case, at the close of all trial testimony, the court is presented with many more facts than were available to it at the summary judgment stage. It is thus incumbent upon this Court, that if it indeed believes that the individual Defendants are entitled to qualified immunity at this stage, that this Court grant it.

II. Qualified Immunity

Determination of qualified immunity is a legal question, the answer dependent on the particular facts of the case. *Sheth v. Webster*, 145 F.3d 1231, 1236 (11th Cir. 1998). The United States Supreme Court held that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *McElligott v. Foley*, 182

F.3d 1248, 1254 (11th Cir. 1999) ("[W]e must 'first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.'").

For a right to be "clearly established" for qualified immunity purposes, previous case law must have developed it in a concrete factual context so as to make it obvious to a reasonable government actor that his actions violate federal law. *Sanders v. Howze*, 177 F.3d 1245 (11th Cir. 1999). Whether applicable law was clearly established at the time of the challenged action is determined by reference to decisions of the United States Supreme Court and the Court of Appeals for the Eleventh Circuit. *D'Aguanno v. Gallagher*, 50 F.3d 877, 881 n.6 (11th Cir. 1995).[8]

In applying the test for qualified immunity, we must take "the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396-97 (1989). The reasonableness inquiry is an objective one: "the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397.

The question presented is whether, on an objective basis, the Customs inspectors had, at the very least, arguable reasonable suspicion that Plaintiff was an alimentary canal smuggler at each of the three graduated steps

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[8] On this record, it is undisputed that the individual Defendants were acting within the scope of their discretionary authority. *See Evans v. Hightower*, 117 F.3d 1318, 1320 (11th Cir. 1997).

of her detention: (1) the initial detention; (2) the restroom search; and (3) the transport to and examination at the Jackson Memorial Hospital.

A. Initial Stop and Pat Down

In the context of border searches, the law that is binding upon this Court is very well settled. Customs and Immigration checkpoints in our Nation's airports are the functional equivalent of national borders, and as such, United States Customs officials can conduct routine searches upon all individuals as a matter of constitutional right. *See Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973); *United States v. Hewitt*, 724 F.2d 117 (11th Cir. 1984). Routine border searches, which include searches of luggage and Terry-style pat down searches, are presumed to be reasonable. *United States v. Ramsey*, 431 U.S. 606, 616 (1977); *United States v. Vega-Barvo*, 729 F.2d 1341, 1344 (11th Cir. 1984) (holding that "[n]o articulable suspicion is required for routine border searches which only intrude slightly on a person's privacy. Both a luggage search and a pat-down or frisk fall within this category and these searches can legitimately be carried out on no more than a generalized "mere suspicion" or "subjective response" of the customs inspector") (internal citations omitted); *Brent v. Ashley*, 257 F.3d 1294 (11th Cir. 2001) (holding that no level of suspicion is necessary for the stop of an entrant, for questioning of the individual, for examination of the entrant's possessions, or for a pat-down of the outer garments).

An initial stop, search of luggage and pat down search, are presumed to be reasonable at the border. *United States v. Ramsey*, 431 U.S. 606, 616 (1977); *Uni-*

ted States v. Vega-Barvo, 729 F.2d 1341, 1344-5 (11th Cir. 1984). Here, the record reveals that Plaintiff was subjected to a pat down behind closed doors. The uncontroverted evidence demonstrates that during this pat down, the Customs official manually inspected Plaintiff's entire body above her clothing. This portion of Plaintiff's experience did not exceed the threshold of routine Customs procedure and as such, was well within the bounds of the law. Because the initial stop did not constitute more than a routine border search, Plaintiff has failed to demonstrate that the initial stop violated her constitutional rights.

B. The Restroom Search

The Supreme Court in *United States v. Montoya De Hernandez*, 473 U.S. 531, 537 (1985) noted that internal smuggling of drugs gives an inspector no external clues that this is the method of concealment. The Court held that "the detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents, considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband in her alimentary canal." *Montoya*, 473 U.S. at 541.

The reasonable suspicion standard requires a showing of articulable facts which are particularized as to the person and as to the place that is to be searched. *Vega-Barvo*, 729 F.2d 1341 (11th Cir. 1984). Furthermore, the level of reasonable suspicion required to justify a search will increase according to the level of the search's intrusiveness. *United States v. Vega-Barvo*, 729 F.2d 1341,

1346 (11th Cir. 1984), *United States v. Ping*, 729 F.2d 1357, 1359 (11th Cir. 1984).

At this point during the enforcement exam, the officers were presented with the following circumstances. Plaintiff was a pregnant female who arrived in Ft. Lauderdale from Jamaica, a source country, after an extremely brief stay. Customs inspectors are aware that short trips are common by smugglers, because the cost of the trip is minimized and the payoff increased. Tr. Friedland, April 18 at 61; Tr. Friedland, April 19 at 96-97. Plaintiff was traveling with no luggage and carried only a purse and handbag. Inspectors were aware that lack of luggage is common for internal narcotics carriers because it minimizes the amount of time that they must remain in the Customs area. Tr. Friedland, April 18 at 70; Tr. Levanka, April 19 at 229. Plaintiff could not provide any specifics about the person who, only four days prior to travel, had purchased Plaintiff's airplane ticket. Inspectors testified that a "third-party booking" of a ticket is significant in the context of internal narcotics couriers, particularly when the passenger does not know the name of the purchaser. Third-party booking is a method that smugglers use to avoid revealing the identity of one or more of the smugglers. Tr. Friedland, April 18 at 69; Tr. Friedland, April 19 at 96; Tr. Smith, April 20 at 143; Tr. Fortin, April 21 at 19.

Plaintiff had taken multiple short trips to Jamaica in 1996. Tr. Denson, April 21 at 189. Plaintiff stated that she went to Jamaica to visit her husband but she was unable to provide an address or telephone number for her husband. Plaintiff could not present verifiable employment information. Lack of verifiable employment is a factor that inspectors consider in assessing the possi-

bility of narcotics smuggling. Tr. Friedland, April 18 at 78, April 19 at 98. Furthermore, the phone number for her employer that Plaintiff provided to SI Friedland was out of service. *Supra.*

To further heighten the Customs officers' suspicion, Plaintiff was flagged as a potential drug courier in the TECS II computer system. Tr. Friedland, April 18 at 125-6, April 19 at 45, 101-102. A TECS II entry is significant to inspectors in assessing whether the person entering the United States is importing illegal drugs. Tr. Smith, April 20 at 131.

In addition to all of these suspicious circumstances, there was the extraordinarily peculiar script that Plaintiff was carrying. The script appeared to be a cover story written for Plaintiff by a third party. Tr. Friedland, April 19 at 36. Each of the Customs inspectors who testified at trial agreed that the script was a "red flag," "highly suspicious," and indicative of someone entering the United States with illegal drugs. Tr. Lavenka, April 20, at 67-68; Tr. Smith, April 20 at 130-131, 137; Tr. Cappuccio, April 21 at 36; Tr. Fortin, April 21 at 17-18, 22-24. Many answers to SI Friedland's questions were provided on the script. Tr. Friedland, April 19 at 39, 101.

At trial Plaintiff testified that at the time of her detention she was carrying immigration documents for Richard Scott's immigration to the United States. Plaintiff testified that the script was tailored to the interview that she and her husband, Richard Scott, were going to have with Jamaican immigration officials. Tr. Denson, April 21 at 144. SI Friedland testified, however, that Plaintiff did not show her these immigration documents. Tr. Friedland, April 18 at 74; Tr. Friedland, April 19 at

40. Plaintiff also testified that she was carrying photographs from her wedding to Richard Scott for their interview with Jamaican immigration officials. Tr. Denson, April 21 at 152, 154; Pl. Trial Ex. 59-B-G. For purposes of this Order this Court assumes, as it must, that Plaintiff was carrying such documents and showed them, as well as the photographs, to SI Friedland.

Furthermore, Plaintiff was traveling with an Affidavit of Citizenship in lieu of a passport. This affidavit of citizenship is a travel document that experienced inspectors had not previously seen and did not know that one could travel with to Jamaica. Tr. Friedland, April 18 at 123; Tr. Friedland, April 19 at 47; Tr. Flynn, April 19 at 149-150; Tr. Lavenka, April 19 at 214, Tr. Smith, April 20 at 139-140. Additionally, Plaintiff exhibited many indications of nervousness that inspectors are trained to look for, including heavy breathing and avoiding eye contact. Tr. Smith, April 20 at 133; Tr. Cappuccio, April 21 at 34.

Moreover, Plaintiff, in the midst of an enforcement exam, requested to use the restroom. SI Friedland, accompanied by Inspector Banks, escorted Plaintiff to the restroom. The door was left open as Plaintiff used the restroom. Tr. Denson, April 21 at 157. SI Friedland testified that she went into the bathroom with Plaintiff because it was Customs policy that two female officers must accompany a female who requests to use the bathroom during an enforcement exam. Tr. Friedland, April 18 at 57. Further, she testified that, as was required by Customs, she watched Plaintiff urinate, looked at her undergarments, panty liner, toilet bowl and used tissue. *Id.* at 57-58; Tr. Friedland, April 19 at 110-111, Tr. Banks, April 21 at 88, 96; Tr. Denson, April 21 at 157-

159. SI Friedland testified that it was not her intent to take Plaintiff to the ladies room or to search Plaintiff absent Plaintiff's request to use the restroom. Tr. Friedland, April 19 at 110. Customs officers were aware that internal narcotics couriers frequently try to dispose of narcotics in the restroom. Tr. Friedland, April 19 at 111.

Significantly, the Customs officers did not search Plaintiff's body in a manner consistent with a typical strip search. Rather the Customs officers' restroom examination of Plaintiff was limited to inspecting the above mentioned items. Second, this Court notes that the intrusiveness of this non-routine border search was minimal. The intrusiveness of a search is measured by the indignity suffered by the person searched. *Vega-Barvo*, 729 F.2d at 1345. In *United States v. Vega-Barvo*, 729 F.2d 1341, 1344 (11th Cir. 1984) the court held that as the intrusiveness of the search increases, the amount of suspicion necessary to justify the search correspondingly increases. *Id.* Thus, the personal indignity suffered by the individual searched controls the level of suspicion required to make the search reasonable. *Id.* at 1346. The Court in *Vega-Barvo* isolated three factors that contribute to the indignity of the person searched: (1) personal contact between the searcher and the person searched; (2) exposure of intimate body parts; and (3) use of force. *Id.* at 1346.

There was no testimony at trial of any physical contact between Plaintiff and SI Friedland during the restroom search. Moreover, any exposure of intimate body parts was minimal. Furthermore, evidence in the record does not support a finding of any threat of force or use of force. As such, viewing the evidence in the light most

favorable to Plaintiff and applying the *Vega-Barvo* factors to assess the indignity suffered by Plaintiff during the restroom encounter, the Court determines that the intrusiveness of this search and the indignity suffered by Plaintiff was minimal.[9]

This Court finds, that even viewing the evidence in the light most favorable to Plaintiff, the Customs officers had overwhelming reasonable suspicion to suspect that Plaintiff was indeed an internal narcotics courier and credible fear that she was requesting to use the restroom to dispose of narcotics. At a minimum, this Court finds that Plaintiff has not shown that a reasonable Customs officer presented with these same facts, would have known that this conduct violated Plaintiff's clearly established constitutional rights.[10] *See Jackson*

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[9] The officers did not visually inspect Plaintiff's orifices nor did they engage in any analysis to determine if her urine contained traces of narcotics.

[10] This Court is mindful of the many cases in which the Eleventh Circuit Court of Appeals has assessed a variety of reasonable suspicion determinations in criminal cases in which defendants have sought to suppress evidence of their internal smuggling. The facts of those cases are no more extensive in finding reasonable suspicion than the facts in this case. In *United States v. Saldarriaga-Marin*, 734 F.2d 1425 (11th Cir. 1984), Marin was wearing a party dress which inspectors thought unusual for travel attire, the ticket had similarities to another traveler in custody, she was nervous, and the passenger stated that she was going to visit a relative, but could not give the address or telephone number for the relative. The court held that those factors constituted reasonable suspicion to conduct an x-ray exam. The x-ray of passenger Marin was inconclusive. A laxative was given to the traveler to induce a bowel movement, which the court upheld. In *United States v. Mosquera-Ramirez*, 729 F.2d 1352 (11th Cir. 1984), the court held that a person who refuses an x-ray search may be detained until a bowel movement occurs through natural body functions. In that case, the court upheld holding the traveler for a monitored bowel movement based on in-

v. Sauls, 206 F.3d 1156 1165 (11th Cir. 2000) ("The burden of showing that an officer violated clearly established law falls on the plaintiff.").

C. Transport to Jackson Memorial Hospital

Upon reasonable suspicion, persons suspected of being "internal drug couriers," "swallowers" or "mules" may be detained and taken to a hospital for either an x-ray or confined for excretion of the stomach contents. *United States v. De Montoya*, 729 F.2d 1369, 1371 (11th

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consistent answers which led to a more thorough search, where the defendant became more nervous and evasive. In *United States v. Pino*, 729 F.2d 1357, 1359 (11th Cir. 1984), the court upheld a rectal exam of the traveler, finding it justified by travel from a source county, inconsistent clothing for the travel purpose, cash ticket purchased by another, and evasive answers provided in a nervous manner. In *United States v. Vega-Barvo*, 729 F.2d 1341, 1344 (11th Cir. 1984), the court held that reasonable suspicion exists for a search, even where it is based substantially on the inability to give a credible explanation for a trip to the United States, traveling alone, nervous, with only one piece of luggage, and a ticket purchased by another. "Since swallowers follow a different mode of operation, customs agents' suspicions will be aroused by different factors. For example . . . the traveler's inability to explain his or her trip. . . . " *Vega-Bravo*, 729 F.2d at 1350. Moreover the facts assessed by the Supreme Court in *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985), were far less suspicious than those presented to the Customs officials in this case. In *Montoya*, suspicions were aroused by the number of trips the traveler had taken, her arrival from a source city, suspicious answers given to questions, and inconsistent possessions for the purpose of the trip. Plaintiff was wearing two pairs of elastic underpants with a paper towel lining, had not taken food or drink, resisted the calls of nature, and had a rigid and firm stomach.

Most significantly, *Brent v. United States*, 66 F. Supp. 2d 1287 (S.D. Fla. 1999) *aff'd sub nom Brent v. Ashley*, 247 F.3d 1294 (11th Cir. 2001), to which this case has often been compared, was decided after the events of this case occurred.

Cir. 1984); *United States v. Padilla*, 729 F.2d 1367 (11th Cir. 1984); *see also United States v. Montoya De Hernandez*, 473 U.S. 531, 544 (1985) ("Once reasonable suspicion exists to detain a traveler, the detention can continue "for the period of time necessary to either verify or dispel the suspicion").

"Once a particularized suspicion arises that you are an internal carrier, the agents can conduct a search sufficient to determine the accuracy of that suspicion, the type of search depending in part on what you consent to. In the absence of consent, the agents can detain you until nature reveals the truth or falsity of their suspicions." *United States v. Pino*, 729 F.2d at 1360. "Once the Customs officers developed reasonable suspicion that [Plaintiff] was an internal carrier, they could permit nature to run its course or ask [Plaintiff] to speed up the process by taking the laxative." *United States v. Saldarriaga-Marin*, 734 F.2d 1425 (11th Cir. 1984).[11] In *Vega-Barvo* the court adopted a "flexible test which adjusts the strength of suspicion required for a particular search to the intrusiveness of that search." 729 F.2d at 1344.

As detailed above, SI Friedland was presented with a plethora of extremely unusual and troubling facts that combined to form her reasonable suspicion that Plaintiff

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[11] This Court notes that handcuffing someone who is a suspected internal narcotics carrier is reasonable. *United States v. Henao-Castano*, 729 F.2d 1364, 1366 (11th Cir. 1984) (finding that "[s]hackling [Plaintiff] to a wheelchair was a reasonable method of preventing him from attempting to dispose of the contents of his stomach before they could be searched").

was an internal narcotics courier.[12] *See, e.g., United States v. Arvizu*, 534 U.S. 266, 275 (2002) (noting that "totality of circumstances" is the principle which "governs the existence *vel non* of reasonable suspicion"); *Vega-Barvo*, 729 F.2d at 1350 ("Many of the factors supporting reasonable suspicion will seem innocent enough if evaluated independently and without the expertise of an experienced customs inspector").

The Customs officers' actions, from their transport of Plaintiff to Jackson Memorial Hospital and the subsequent examinations of Plaintiff, were reasonable in light of the overwhelming evidence that provided the officers with reasonable suspicion that Plaintiff was an internal narcotics carrier. At a minimum, this Court finds that Plaintiff has not shown that a reasonable Customs officer presented with these same facts, would have known that this conduct violated Plaintiff's clearly established constitutional rights. *Jackson v. Sauls*, 206 F.3d 1156 1165-66 (11th Cir. 2000) ("when an officer asserts qualified immunity, the issue is not whether reasonable suspicion existed in fact, but whether the officer has 'arguable' reasonable suspicion," that is, whether a reasonable officer could have believed that the searches comported with the plaintiff's constitutional rights). The testimony of each of the Customs officials at trial sup-

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[12] The evidence presented at trial reveals that the SI Friedland did not seek permission to transport Plaintiff to JMH until after the restroom search. At that time, the facts that were presented to SI Friedland before the restroom search and the accompanying reasonable suspicion had not dissipated. Moreover, the bathroom search, as minimally intrusive at it was, did not provide the individual Defendants with evidence as to whether Plaintiff was an internal carrier or whether her urine contained traces of narcotics. The transport to JMH based on these facts was therefore reasonable.

port this Court's determination that the individual Defendants' actions were at the very least based on arguable reasonable suspicion.

CONCLUSION

Accordingly, based on the foregoing it is

ORDERED AND ADJUDGED that qualified immunity is GRANTED to the individual Defendants Cheryl Friedland and Lee Lavenka.

DONE AND ORDERED in Chambers at Miami, Florida, this 3rd day of October, 2005.

/s/ K. M. MOORE
K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

cc: All counsel of record

REPLY BRIEF

(3)

No. 09-803

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

JANNERAL DENSON and JORDAN L. TAYLOR, a minor, through his Legal Guardian JANNERAL DENSON,

Petitioners,

v.

UNITED STATES OF AMERICA, LEE LAVENKA, and CHERYL FRIEDLAND,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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Petitioners, Janneral Denson and Jordan L. Taylor, a minor, respectfully reply to Respondents' Brief in Opposition.

STATEMENT OF THE CASE

Contrary to the Respondents' recitation of the statement of the case, the record evidence clearly reflects Petitioner's statement of the case. Respondents rely wholly upon the testimony of Respondents Cheryl Friedland and Lee Lavenka. (Respondents' Brief, p. 2-7, 10-11). Said evidence was found by Appellate Panel 1 to be severely lacking in probable cause, in that "[a] reasonable customs inspector acting in the federal defendants' stead would have known that the non-particularized, general concerns evoked by [Denson]'s appearance and actions did not create sufficient probable cause to justify the intrusive searches." *See* Appendix C, at 122a.

Respondents' reliance upon the "tablet" found in Petitioner's bag during the search at the airport is equally misplaced. (Respondents' Brief, p. 4-5). The district court, in response to Respondents' summary judgment motions, held that:

> [D]enson was carrying a sheet of paper, written in the second person singular, which Inspector Friedland claims contained answers to questions that might be posed by customs or immigration officials. These answers simply do not give rise to the type of suspicion that is necessary for a strip search. The sheet of paper, while strange, provides no basis for

> suspicion that Denson was an internal courier. *The information on the paper was clearly directed towards immigration issues, rather than to customs issues. Nothing in the paper supports the suspicion that Denson was carrying drugs, as would be necessary to support the strip search.*

(Emphasis added). *See* Order entered January 29, 2002; R217-19.

Respondents also argue that "[P]etitioner was not forced to drink the laxative" but that she "drank the [laxative] in order to put an end to her ordeal." (Respondents' Brief, n. 3, citing to Appellate Panel 2, Appendix A, at 77a, n.3). Each search of Petitioner's body was without her consent and each search was more invasive and dangerous, culminating in her being forced to take the bowel cleaner, Go-Lytely. The district court acknowledged that "she had to drink the Go-Lytely and pass three clear stools or she was not going to be able to leave." *See* Appendix B, at 93a.

The evidence presented at trial demonstrated that the Petitioner was forced to undergo ever more life threatening searches of her body based upon "non-particularized, general concerns" and a "piece of paper" directed "towards immigration issues." Based upon this evidence a jury certainly could have reasonably concluded that the ever more intrusive searches of Janneral Denson's body had violated her constitutional rights.

I. Without a jury verdict through special interrogatories, no factual determination upon which to base a qualified immunity analysis could be made by the district court or Appellate Panel 2.

Respondents state that

> . . . nothing prevented the district court from reconsidering its previous denial of qualified immunity. Nor was the court of appeals estopped from finding these items, and the totality of the surrounding circumstances, equally suspicious. . . . Were it otherwise, courts would be required to view the evidence in the light most favorable to a plaintiff at the summary-judgment stage, and then would be unable to evaluate the evidence and reach a different conclusion at the trial stage.

(Respondents' Brief, p. 20). Respondents are wrong. For a judgment as a matter of law, in the absence of a jury's finding of fact, both the lower court and the Appellate Panel, in reviewing qualified immunity, were required to view all the record evidence in the light most favorable to the Petitioner, the nonmoving party. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-1 (2000).

Having found for the Respondent on the FTCA claims, the district court dismissed the jury without allowing them to render a verdict on the *Bivens* claim against Respondents Friedland and Lavenka, as the district court had barred the *Bivens* claim. Appellate Panel 2 affirmed the district court's error in finding no violations of Petitioner's constitutional rights.

Contrary to Respondents' claim that there were facts "materially different" at trial from those at the summary judgment stage when qualified immunity was denied (Respondents' Brief, p. 20), the only difference was that the district court and Appellate Panel 2 invaded the domain of the jury, weighing evidence, making credibility determinations and choosing to ignore the evidence presented by the Petitioner. Petitioner's evidence clearly demonstrated that each more invasive search of Ms. Denson's body by the Respondents was based solely upon an outdated TECS document and a "sheet of paper" which Respondents knew about at the airport, and which the district court and Appellate Panel 1, at the summary judgment stage, clearly stated did not provide a basis for the strip and cavity searches.

The jury was not required to believe Friedland's testimony that Denson was "was attempting to quickly exit the Customs area, was traveling alone, was avoiding eye contact, . . . had significant difficulty in answering routine questions about her trip and exhibited signs of nervousness, . . . was breathing heavily, sweating profusely, and holding on to an x-ray machine to avoid shaking," (Respondents' Brief, p. 2-3) in light of the fact that said testimony had been contradicted by Petitioner's evidence.

As Respondents acknowledge, at the summary judgment stage the district court "placed no weight on two key pieces of evidence available to the Customs inspectors: the suspicious script, and the TECS alert identifying petitioner as a potential drug courier. 98-7256 Order 19-21 (S.D. Fla. Jan. 29, 2002) (docket entry 217). After discovery and trial, however, the

district court concluded that both of these factors were highly suspicious." (Respondents' Brief, p. 20). The two pieces of evidence did not change. Nothing changed as to the outdated TECS document and "*[n]othing in the paper supports the suspicion that Denson was carrying drugs, as would be necessary to support the strip search.*" (Emphasis added). *See* Order entered January 29, 2002; R217-19. Appellate Panel 2 accepted the finding of the district court. This ignored the role of the jury. As to the *Bivens* claim, it was up to the jury to determine what significance, if any, to assign to the expired TECS document and the piece of paper found in Petitioner's luggage at the airport.

Respondents argue that, in a jury trial, the courts are "not estopped" from determining the suspiciousness of the evidence, i.e. weighing the evidence, since, "[w]ere it otherwise, courts would be required to view the evidence in the light most favorable to a plaintiff at the summary-judgment stage, and then would be unable to *evaluate the evidence* and reach a different conclusion at the trial stage." (Emphasis added)(Respondents' Brief, p. 20). Without a jury's finding of fact, there was simply no factual basis for Appellate Panel 2 to determine whether arguable reasonable suspicion existed sufficient to detain Denson and conduct the ever more invasive, degrading and dangerous searches of her private body cavities.

II. The judgment in the FTCA claim did not bar Petitioner's Bivens claim.

Respondents state that

> [e]ven if there were any error on the qualified immunity determination, petitioner's *Bivens* claim would fail based on a separate ground. As the district court explained, the judgment bar in the FTCA barred petitioner's *Bivens* claim.

(Respondents' Brief, p. 20-1). According to the district court and Respondents, while a plaintiff may simultaneously bring both FTCA and *Bivens* claims, the *Bivens* claim will always be barred by any decision on the FTCA claim. This interpretation is in conflict with the Westfall Act and the rulings in *Will v. Hallock*, 546 U.S. 345 (2006) and *Carlson v. Green*, 446 U.S. 14 (1980). See also: *Hui v. Castaneda*, 08-1529 (U.S. 5-3-2010).

The 1974 and 1988 amendments to the FTCA enabled plaintiffs to bring an action against the United States for intentional torts committed by federal law enforcement officers *simultaneously* with a *Bivens* action against the individual defendants for constitutional violations. Since the FTCA was no longer the exclusive remedy in such circumstances, the judgment bar did not apply to a plaintiff's *Bivens* claims.

> FTCA was enacted long before *Bivens* was decided, but when Congress amended FTCA in 1974 to create a cause of action against the United States for intentional torts committed

> by federal law enforcement officers, 28 U.S.C. §2680(h), the congressional comments accompanying that amendment made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action . . .

Carlson, *supra* at 19-20.

> In the absence of a contrary expression from Congress, §2680(h) thus contemplates that victims of the kind of intentional wrongdoing alleged in this complaint shall have an action under FTCA against the United States *as well as* a *Bivens* action against the individual officials alleged to have infringed their constitutional rights.

(Emphasis added). *Id.* at 20.

In 1988, Congress codified the holding in *Carlson*, by passing the Westfall Act.

> Section 5 declares that the FTCA is *not* the exclusive remedy for torts committed by Government employees in the scope of their employment when an injured plaintiff brings: (1) a *Bivens* action, seeking damages for a constitutional violation by a Government employee; or (2) an action under a federal statute that authorizes recovery against a Government employee. See 2679(b)(2).

United States v. Smith, 499 U.S. 160, 166-7 (1991).

> While a qualified immunity claim is timely from the moment an official is served with a complaint, the judgment bar can be raised only after a case under the Tort Claims Act has been resolved in the Government's favor. If a *Bivens* action alone is brought, *there will be no possibility of a judgment bar, nor will there be so long as a Bivens action against officials and a Tort Claims Act against the Government are pending simultaneously.*

(Emphasis added). *Hallock*, *supra* at 354.

There is much confusion and conflict among and within the circuits on the issue of Bivens and the FTCA's judgment bar. Some courts have held that any FTCA judgment, regardless of its outcome, bars a subsequent Bivens action on the same conduct that was at issue in the prior judgment.[1] Other cases, some of which were decided before the 1988 Westfall Act, have held that an FTCA judgment against the government bars a contemporaneous Bivens claim.[2] Some courts, where concurrent FTCA and Bivens actions had been filed, have allowed the plaintiffs' Bivens actions to proceed to

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1. *Hoosier Bancorp of Indiana, Inc. v. Rasmussen*, 90 F.3d 180 (7th Cir. 1996); *Farmer v. Perrill*, 275 F.3d 958 (10th Cir. 2001); *Gasho v. United States*, 39 F.3d 1420 (9th Cir. 1994).

2. *Serra v. Pichardo*, 786 F.2d 237 (6th Cir. 1986); *Arevalo v. Woods*, 811 F.2d 487 (9th Cir. 1987); *Rodriguez v. Handy*, 873 F.2d 814 (5th Cir. 1989); *Aetna Casualty and Surety Co. v. United States*, 570 F.2d 1197 (4th Cir. 1978); *Engle v. Mecke*, 24 F.3d 133 (10th Cir. 1994).

trial after an adverse judgment on the FTCA claims.[3] Other courts have held that any FTCA judgment, for or against, bars any Bivens claim on the same conduct, even nullifying a previous entered verdict on the Bivens claim.[4]

III. The claims and injuries of a minor child are determined under state law and, are therefore, separate, not derivative of his mother's injuries and claims under the Federal Tort Claims Act.

Respondents state that:

> [b]ecause petitioner Taylor and his mother were inherently inseparable for purposes of analyzing reasonable suspicion for the searches . . . the court of appeals properly rejected petitioner Taylor's tort claims as derivative of his mother's tort claims.

(Respondents' Brief, p. 22).

Under Florida law, an action is derivative when a claimant seeks damages based on injuries to another party. However, an action where a party sues in his own right for his own injuries and damages is not a derivative action. *See Stokes v. Liberty Mutual Insurance Co.*, 213

3. *Kreines v. United States*, 959 F.2d 834 (9th Cir. 1992); *Burns v. Lawther*, 53 F.3d 1237 (11th Cir.1995)(per curiam); *Brent v. Ashley*, 247 F.3d 1294 (11th Cir. 2001).

4. *Trentadue v. United States*, 397 F.3d 840 (10th Cir. 2005); *Manning v. United States*, 546 F.3d 430 (7th Cir. 2008); *Harris v. United States*, 422 F.3d 322 (6th Cir. 2005).

So.2d 695, 698 (Fla. 1968). Petitioner Taylor's primary FTCA claims were for assault and the infliction of emotional distress flowing from the physical injuries he suffered as a result of that assault, not false arrest and imprisonment. Therefore Respondents Friedland and Lavenka's actions towards him must be analyzed separately under the appropriate legal standard, pursuant to Florida law.

Appellate Panel 2 acknowledged that Respondent Friedland knew that Denson was "obviously pregnant" and that "x-ray examinations may not be performed on a pregnant woman for fear of harming the unborn child" (Appendix A, at 5a). The district court found that "Friedland and Lavenka had required Denson to take the bowel cleanser, Go-Lytely". *See* Trial Transcript, April 22, 2005: R374-42-3. However, neither court made any factual determination as to whether the force directed toward Petitioner Taylor, subjecting him to an unnecessary risk of harm, was reasonable and justified under the circumstances. Neither court made any factual determinations as to Petitioner Taylor's FTCA claims.

Respondents' attempt to negate the Florida Born Alive Doctrine (Respondents' Brief, p. 22-3), overlooks the obvious fact that, prior to birth, all fetuses are inherently inseparable from their pregnant mothers and that the treatment of or any injury to the mother is likely to result in a separate and different injury to the unborn child. The law is well established in Florida that a child born alive is entitled to seek compensation for his injuries sustained in utero. "'[A] child born alive, having suffered prenatal injuries at any time after conception,

has a cause of action against the alleged tortfeasor.'" (Internal citation omitted). *Larusso v. Garner*, 888 So.2d 712, 719 (Fla. 4th DCA 2004), review denied, 910 So.2d 262 (Fla. 2005).

IV. The Supremacy Clause does not bar state tort claims in FTCA claims

Respondents state that:

> The court of appeals held that petitioners' FTCA claims are barred by the Supremacy Clause. We agree with the court's premise that Congress could not have intended that the United States would be held liable for the actions of its law enforcement officers that were constitutional and within the scope of their official duties, because such conduct would ordinarily be privileged.

(Respondents' Brief, p. 25).

Appellate Panel 2 held that, if the customs agents' conduct comported with federal law, the Supremacy Clause would bar any state tort claims in a FTCA case, regardless of whether liability could be found under state law.

Not only is there no conflict between Florida and federal law in this case to warrant an application of the Supremacy Clause, there was no evidentiary support for the position of Appellate Panel 2 that Friedland and Lavenka "complied with the full spectrum of federal statutory, regulatory, and constitutional law and did no

more than was essential to carrying out their duties." *See* Appendix A, at 63a. In fact, at trial, Petitioner had attempted to introduce into evidence the applicable federal regulations and Customs directives that Respondents had violated, but this evidence was excluded by the district court. Therefore, evidence that would have established if they complied with Customs regulations was not contained in the record evidence.

Moreover, pursuant to the district court's findings of fact as to Petitioner Denson's FTCA claim, the issue remains as to whether it was objectively reasonable for Respondents to conduct the increasingly intrusive, degrading and medically dangerous body cavity searches of Petitioner Denson in the absence of her consent and without any reevaluation or balancing of the level of suspicion against the level of intrusiveness and indignity. Likewise, as to Petitioner Denson's FTCA assault claim, the question of whether the force Respondents directed towards her was reasonable under the particular facts and circumstances remains unanswered.

CONCLUSION

For the foregoing reasons and as stated in their Petition, Petitioners respectfully request that the Court grant certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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